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SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN RE:

ENZO MORELLA, Plaintiff,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant.

BRIEF OF DEFENDANT
SAFECO INSURANCE COMPANY OF ILLINOIS

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I. INTRODUCTION

This is a unique case where an insurance claimant demanded arbitration, arbitrated the value of his claim for UIM benefits against the insurer, received prompt payment of the arbitration award and only later -- five months after receiving full payment of his claim under the policy -- sent the insurer and the Insurance Commissioner statutory notice that he had a claim under the Insurance Fair Conduct Act, RCW 48.30.015 (“IFCA”). Plaintiff’s IFCA Notice demanded three times the arbitration award that had already been paid. Plaintiff filed suit a year later. The applicable timeline cannot be disputed:

Plaintiff demanded arbitration:	July 9, 2009
Safeco offered \$45,000:	Oct. 26, 2010
Plaintiff was awarded \$62,000:	Nov. 19, 2010
Plaintiff cashed Safeco’s award check:	Dec. 10, 2010
Plaintiff provided statutory IFCA Notice:	May 13, 2011
Plaintiff filed this IFCA action:	March 26, 2012

Recognizing the novelty of Plaintiff’s claim for damages in light of the fact that he was already paid, the district court acknowledged: Safeco “rightly points out that the \$62,000 had already been paid at the time this action was filed and cannot be re-awarded in this lawsuit.” The district court then queried: “What, then, are the ‘actual damages’ that may be recovered in this IFCA action? Is it the \$62,000 awarded in arbitration or is it simply the loss of use of that money for some period of time, the costs

of the arbitration proceeding itself, or some other compensable injury?”

See Order Certifying Question to State Supreme Court, Doc. 33, pp. 8-10.

As set forth below, Plaintiff has no damages recoverable under IFCA. First, in reviewing the certified issue, IFCA must be strictly construed. This Court has long held that treble damages statutes are punitive in nature and that such statutes must be strictly construed. This Court also has long expressed its “repugnance” to punitive damages, which are contrary to public policy and in derogation of the common law.

Second, it is textbook common law that a plaintiff cannot recover money from an insurer or any other person that he has already received from that person. The result is no different under IFCA, which authorizes suit “to recover actual damages,” not nominal damages, and contains a statutory notice and cure period. A claimant must give notice to the insurer and to the Insurance Commissioner. The insurer then has twenty days to cure before the claimant can commence suit. The notice and cure provision is an important part of IFCA, added as a House Amendment to address the harsh potential for treble damages against the insurer. IFCA was a controversial statute because it broke from this state’s long prohibition against punitive damages. The legislature determined that if an insurer may be subject to treble damage claims for unreasonably denying a claim, it must be given statutory notice and an opportunity to

cure. In this case, it is not disputed that Safeco fully paid Plaintiff's claim before statutory notice was provided and before Plaintiff's commencement of the IFCA action. To find any IFCA damages recoverable under these circumstances would ignore the plain meaning of the "actual damages" provision and render the notice and cure provisions superfluous.

Third, Plaintiff also has no recoverable IFCA damages because Safeco cured any IFCA violation, even before the arbitration award was issued and paid. Plaintiff's IFCA claim is based upon a \$1,500 settlement offer initially extended by Safeco. Plaintiff argued and the district court found that this offer was not reasonable. Safeco disputes this finding by the district court, but the important fact for purposes of this certification proceeding is that Safeco followed up with an offer to pay Plaintiff \$45,000. That offer was extended before the arbitration (and long before statutory notice was given). That \$45,000 offer was reasonable and it is supported by the arbitrator's findings that Plaintiff had fully recovered from his injuries, had no claim for lost wages, that Plaintiff's alleged back pain was not caused by the accident, and other findings adverse to Plaintiff.

The "actual damages" and notice and cure provisions and Safeco's payment of the arbitration award prior to the filing of this action are dispositive of Plaintiff's damages claim under IFCA. The Court,

therefore, need not and should not review further what hypothetical damages Plaintiff might have been entitled to if he had provided his IFCA notice earlier or had Safeco not promptly paid the arbitration award.

To the extent the Court further reviews the certified issue, it should rule as follows. First, “actual damages” under IFCA are limited to those damages proximately caused by the statutory violation. They do not include Plaintiff’s personal injuries, which were caused by the auto accident and not by Safeco’s conduct. They do not include policy benefits that were owed to Plaintiff under the UIM policy and existed separately and irrespective of the reasonable or unreasonableness of the settlement offers extended by Safeco. Applying principles of proximate cause here is supported by IFCA’s language, case law applying similar statutory language, and the common law.

Second, mental and emotional distress are not “actual damages” under IFCA. Following the Supreme Court of the United States’ 2012 decision in *FAA v. Cooper*, proper construction of IFCA precludes a broad interpretation of the scope of “actual damages” to reach emotional distress. Under the Consumer Protection Act (“CPA”) and other statutes existing when IFCA was enacted, “actual damages” were limited to actual pecuniary loss and did not include emotional distress. The Washington legislature did not express an intention in IFCA to allow recovery for

emotional distress, and principles of strict construction, therefore, preclude such recovery here. Moreover, Plaintiff did not identify emotional distress in his IFCA notice or complaint and he has no objective symptomatology.

Third, attorney's fees and costs are recoverable under IFCA, but are not "actual damages" that may be trebled. This follows from the statute's language, which treats fees and costs separate from damages, and it is also the law for CPA claims under language similar to IFCA.

Finally, if Plaintiff had not already been paid everything that the arbitrator determined was owed to him, Plaintiff's actual damages under IFCA would be limited to any loss of the use value of any monies proven by Plaintiff to have been belatedly paid by Safeco. Plaintiff's claim is essentially that he should have been paid earlier. His actual damages, if proven, would be limited to the interest on the difference between what the district court finds an insurer acting reasonably would have offered to pay Plaintiff and the amount that was, in fact, offered by Safeco to Plaintiff from the time that the district court determines that the reasonable offer should have been extended until the earlier of the time that Safeco made a reasonable offer to settle Plaintiff's coverage claim or paid the arbitration award. Plaintiff cannot recover loss of use value here, because the arbitrator already determined and Safeco already paid Plaintiff's total recovery.

II. STATEMENT OF ISSUES

1. Whether IFCA should be strictly construed because it is a penal statute and in derogation of common law.
2. Whether Plaintiff has no “actual damages” to recover because he was indisputably paid his claimed policy benefits before he provided statutory notice to Safeco, before expiration of the statutory cure period and before commencing this IFCA action.
3. Whether Safeco’s \$45,000 offer to Plaintiff in advance of the arbitration and prior to receiving IFCA Notice, if found to have been reasonable, cured the alleged IFCA violation and further negates any alleged IFCA damages.
4. Whether “actual damages” under IFCA are limited to damages proven to have been proximately caused by the alleged unreasonable settlement offer, alleged failure to pay policy benefits, or other alleged IFCA violation.
5. Whether under the facts of this case the \$62,000 policy benefits claimed by Plaintiff are not actual damages proximately caused by an IFCA violation because the damages were caused by the personal injuries obtained in the vehicle accident that pre-existed and were not exacerbated by any alleged unreasonable conduct by Safeco.
6. Whether Plaintiff has identified any clear statutory language or authority to support an award of policy benefits or emotional distress damages as “actual damages” under IFCA.
7. Whether Plaintiff’s claim for emotional distress as “actual damages” under IFCA should be rejected because: (i) IFCA must be strictly construed; (ii) there is no clear expression of intent in IFCA to allow recovery for emotional distress; (iii) the CPA and other statutes with similar language do not allow recovery for emotional distress; (iv) the Supreme Court of the United States has found the words “actual damages” to be ambiguous and to not include emotional distress damages where a statute was required to be strictly construed; and (v) Plaintiff did not identify emotional distress damages in his IFCA Notice or his Complaint and has no objective symptomatology.

8. Whether Plaintiff can transform attorney's fees and costs into "actual damages" under IFCA by invoking an arbitration clause, where he concedes that such attorney's fees would not be "actual damages" if he had chosen to litigate the value of his claim in court with his IFCA action.
9. Whether Plaintiff's actual damages, if Safeco had not paid the arbitration award, would be limited to interest on the amount an insurer acting reasonably would have offered Plaintiff to settle his claim from the time that a reasonable insurer would have made the offer until the time that Safeco is found to have made a reasonable offer or paid the arbitration award.
10. Whether statutory prejudgment interest on IFCA actual damages is precluded under Washington authorities finding prejudgment interest not recoverable under the compensatory or punitive damages portion of treble damage statutes and/or because IFCA must be strictly construed, statutory prejudgment interest does not reflect "actual damages," and Plaintiff's claim in the arbitration was not liquidated.

III. STATEMENT OF THE CASE

A. The Factual Record

1. Mr. Morella's Claim for UIM Coverage

Mr. Morella was a passenger of a Safeco insured, Robert Vert, when Mr. Vert's vehicle was struck by Mutual of Enumclaw ("MOE") insured, Robert Burris. As Mr. Vert's passenger, Mr. Morella was entitled to UIM coverage from Safeco. Mr. Morella also was entitled to Personal Injury Protection benefits through MOE.

Safeco never disputed that Mr. Morella was entitled to coverage. When Plaintiff submitted his claim, Safeco's adjuster, Linda Loomis,

reviewed Mr. Morella's medical records and bills, which had already been paid by MOE. After summarizing those records, she offered Mr. Morella \$1,500. Doc. 26, pp. 5-9. In response, Mr. Morella requested that Safeco consider additional information, including new assertions by Mr. Morella that he had paid \$800-900 for medical expenses that were not reimbursed by MOE, and for lost wages and the cost of hiring an employee to cover for his landscaping business. Doc. 26, p. 9. Safeco promptly requested that Mr. Morella provide additional information to substantiate his claimed medical expenses and economic losses. Safeco did not hear back from Mr. Morella until July 9, 2008. At that time, Mr. Morella indicated by email that he had returned to a chiropractor for additional treatment and therefore was not prepared to resolve his claim. Mr. Morella wrote: "So at this point I don't think we are ready to close this case." Doc. 26, pp. 13-15. Safeco responded the same day, asking that Mr. Morella have his chiropractor "forward the medical bills and charts to expedite the matter." Doc. 26, p. 1. Safeco followed up again on August 18, 2008 with a request for records. Doc. 26, p. 17.

Having not heard back from Mr. Morella, Safeco followed up again with a letter on November 10, 2008, indicating that it had not heard back from him and requesting a treatment update. *Id.* at p. 20. Mr. Morella's counsel responded six months later on March 6, 2009. Doc. 26-

1, pp. 22-28. The first sentence of the letter stated: “I write at this time to provide you with the information necessary for you to evaluate our client’s claim.” The demand letter claimed economic losses totaling \$10,007.52, which included alleged medical expenses totaling \$9,694.80. Those medical expenses related not only to injuries caused by the accident, but also to back injuries that Safeco contended and the arbitrator ultimately found were not caused by the accident. No information was provided to substantiate any lost wages. Nonetheless, Mr. Morella’s counsel demanded \$75,000 to settle his claims. There was no allegation in that letter that Safeco had engaged in bad faith, violated any WAC regulations, or could be liable for IFCA damages.

Safeco’s adjuster evaluated the information provided by Mr. Morella’s counsel and renewed its \$1,500 offer. The adjuster determined, among other critical facts, that: (i) medical expenses claimed by Mr. Morella did not result from the accident, since there was a 12 month lapse of treatment; (ii) there had never been any objective evidence of injury; and (iii) Mr. Morella’s treating physician had previously recommended that treatment be stopped and his claim closed. Doc. 26-1, pp. 4-13.

2. Mr. Morella Demanded Arbitration

Contrary to his argument in the district court that he was compelled by Safeco to arbitrate, Plaintiff thereafter demanded arbitration

on July 9, 2009. Plaintiff's counsel, Raymond Bishop, wrote to Safeco: "Per our voicemail today, we are demanding UIM arbitration." Doc. 24, p. 42. Enclosed with the letter was Claimant's Notice of Intent to Arbitrate UIM Dispute, which declared that Safeco was bound by the arbitration agreement in the Policy. *Id.*

Notes of a call from Plaintiff's counsel to Safeco that same day further confirm that Plaintiff requested arbitration, not Safeco. Doc. 26-1, p. 14. Those notes indicate: "Received call from atty Raymond Bishop 206 592 9000 stat[ing] [t]hat they are going to take this claim to arbitration. They stated that they received our policy and reviewed it, specifically the arbitration provision stating 'arbitration shall begin upon written demand from either party.' He stated that negotiations are not going to[o] well from their client's perspective so they will arbitrate using this policy language." *Id.*¹

Neither the arbitration demand nor the notes from this telephone call from Plaintiff's counsel contained any reference to IFCA.

3. Mr. Morella First Refers to IFCA One Week Before The Arbitration After Receiving a \$45,000 Offer

¹ The Policy provided that if the parties do not agree on the amount of damages recoverable, "then the matter may be arbitrated." It further provided that "Arbitration shall begin upon a written demand from either party." Doc. 24, p. 21.

Mr. Morella first asserted that Safeco was engaging in bad faith and in violation of WAC insurance regulations by letter dated October 15, 2010 -- two weeks before the scheduled arbitration. Doc. 26-1, pp. 25-29. He demanded that Safeco pay its policy limits of \$100,000.² *Id.*, p. 28. There was no reference in that letter to IFCA or treble damages claims and the letter was not sent to the Insurance Commissioner. But, even if that letter could be construed to constitute IFCA notice, Safeco immediately cured any IFCA violation. Safeco promptly resolved the alleged basis for any IFCA cause of action on October 26, 2010 when it offered Mr. Morella \$45,000. Doc. 26-1, pp. 33-36. That settlement offer was in a reasonable range, given that Mr. Morella's claimed medical expenses totaled less than \$10,000, that the evidence did not support any ongoing injury claim, and that independent financial experts, Grant Thornton, had calculated Mr. Morella's earnings loss to be "between \$0 and \$1755."³ The \$45,000 offer was also proven to be within a reasonable range, given the arbitrator's findings discussed below, which were adverse to Mr. Morella.

² Mr. Morella's counsel demanded that Safeco pay Mr. Morella its policy limits, even though he was also representing Mr. Vert in connection with a claim to the same policy proceeds.

³ Grant Thornton's report is in the certified record at Doc. 26-1, pp. 20-23. The arbitrator ultimately determined that Plaintiff had no claim for lost wages.

Mr. Morella's counsel responded on October 26, 2010, raising IFCA for the first time and repeating his demand for \$100,000. Doc. 26-2, pp. 3-5. Recognizing that Safeco's \$45,000 offer had cured any alleged IFCA violation, he argued self-servingly that Safeco could not "save itself from inevitable bad faith and IFCA claims by offering \$45,000 at the last minute." *Id.* at p. 3. Morella, however, did not serve Safeco or the Insurance Commissioner at that time with any statutory IFCA notice.⁴ Rather, he proceeded to arbitrate his dispute.

4. The Arbitration Decision and Award

The parties arbitrated on November 2, 2010 before John Cooper. Mr. Cooper issued an Arbitration Decision and Award on November 19, 2010, awarding Plaintiff \$62,000. *See* Doc. 14, p. 4 (Award) and Doc. 24, pp. 44-47 (Explanatory Letter).

Notably, the written arbitration decision contained no itemization and made several findings adverse to Mr. Morella, which arguably do not support the \$62,000 award. Rather than point to evidence of injury or damage, Mr. Cooper found that "the strongest part of claimant's case is Enzo Morella himself. He is a likeable, honest man who seems to be a rather poor historian." Doc. 24, p. 46. Mr. Cooper also found that the

⁴ The Insurance Commissioner has a form "Insurance Fair Conduct Act 20-Day Notification Sheet" available to the public on its website. *See* Appx. 1.

evidence did not support Plaintiff's claimed injuries, and that Plaintiff was leading an active life, which included upland bird hunting trips:

- “[Mr. Morella’s] current accounts of his pain duration and magnitude in the past do not square with the medical evidence or his deposition testimony in many respects.”
- “The evidence presented does not support the conclusion that his low-back problems, which developed much later on, are related to the accident on a more probable than not basis.”
- “[H]e continues to lead an active life in many respects and even testified about leaving on his annual hunting trip in the Dakotas the day following the arbitration hearing - a journey of some 1,500 miles by car. ... I do know a little bit about upland bird hunting and the fact that he continues to participate in the same on a regular and frequent basis indicates that his claimed disabilities are, at most, irregular and not truly debilitating in nature.”
- “Dr. Leifheit essentially concludes that Mr. Morella has recovered from his injuries; to argue otherwise would be to ignore these quite clear and definite statements.”

Id., Doc. 24, p. 46. “As to the alleged economic losses,” Mr. Cooper similarly found: “it strikes me that these claims are fundamentally flawed in many respects.” “[N]o specific wage or salary [was] being claimed as there is none,” “the evidence is rather sketchy as to just how much time Mr. Morella actually lost,” and the evidence showed that the hiring of a landscaper to assist Mr. Morella with his landscaping business, “was very beneficial to the company, as it enjoyed significantly increased profitability, even in economically challenging times over the past several years.” *Id.*, pp. 45-46. Mr. Cooper concluded: “While I do think it is appropriate to allocate some portion of what was paid to each gentleman

as a minimal recognition of some earning capacity impairment, it cannot be considered to be truly significant in light of all the other testimony and evidence presented.” *Id.*, p. 46.

5. Plaintiff Provided IFCA Notice Months Later

The Arbitration Decision and Award was issued on November 19, 2010. Pursuant to that Decision and Award, Safeco and MOE paid Plaintiff \$62,000 in December 2010. *See* Doc. 36, Appx. 2, Declaration of Jennifer Oudes.⁵ Over five months later, on May 13, 2011, Plaintiff mailed to Safeco and the Office of Insurance Commissioner a letter containing for the first time his statutory notice of claim under IFCA. Doc. 8-1, pp. 2-5. That May 13, 2011 letter, which became effective three days after mailing, was titled in all capital letters, underlined and centered:

NOTICE OF CLAIM - INSURANCE FAIR CONDUCT ACT
(RCW 48.30.015)

The letter declared in the first paragraph: “I write to notify you of claims under ... the Insurance Fair Conduct Act.” The letter identified “actual damages” of \$62,000 -- the amount already paid by Safeco and received by Plaintiff -- together with Mr. Morella’s claimed attorney’s fees and costs associated with the arbitration. There were no allegations or claimed

⁵ Safeco has filed an accompanying Motion to Supplement the Record with this Declaration and other filings that are before the district court, but not yet part of the certified record.

damages for emotional distress.⁶

Plaintiff filed suit on March 26, 2012. Plaintiff's Complaint alleges that he provided IFCA Notice "[o]n or about July 11 2011." Compl. ¶ 55 (*see* Doc. 2-1, pp. 7). Whether IFCA Notice was given in May of 2011 or later in July of 2011 as Plaintiff alleged, Plaintiff cannot dispute that such notice was given long after he had already been paid the \$62,000 arbitration award.

6. The Court's Summary Judgment and Certification Orders

On summary judgment, the district court found that Safeco's initial offer of \$1,500 was unreasonable and, therefore, in violation of IFCA. Safeco disputes that ruling, which failed to consider the investigation completed by Safeco and the limited information submitted by Plaintiff at the time that the offer was made. The Court also mistakenly found that Plaintiff was compelled to arbitrate, even though Plaintiff (not Safeco) had invoked the arbitration clause in the policy.

Safeco filed a Motion for Reconsideration. Doc. 34, Appx. 3. The

⁶ Even though Plaintiff had no viable IFCA claim, Safeco offered to pay Plaintiff \$5,500 for attorney's fees and expenses that Plaintiff claimed to have incurred before Safeco extended the \$45,000 settlement offer. That \$5,500 offer was based on the fees and costs identified in Plaintiff's IFCA Notice, and Safeco's counsel further requested: "If you can provide credible information showing that more than \$3,100 in expenses was incurred before October 26, 2010, please do so and the Company will re-evaluate and provide you with an appropriate response." *See* Doc. 10, pp. 4-6.

district court found that Safeco did not meet the standard applicable to motions for reconsideration but implicitly acknowledged that there were factual errors in its analysis. *See* Order Denying Motion for Reconsideration, Doc. 35, Appx. 4. The district court stated that “For the most part, the court accurately apprehended the existing record and applied the law to those facts.” (Emphasis added.) The district court halfheartedly admitted that it had relied on the wrong arbitration agreement, but did not fix its factual mistakes, noting: “To the extent the Court did err by relying on an inapplicable arbitration agreement when discussing the permissive vs. mandatory nature of the agreement, that discussion was primarily background for the analysis of the phrase “actual damages” as it is used in the Insurance Fair Conduct Act.” *Id.* at pp. 1-2.⁷

IV. ARGUMENT

A. RCW 48.30.015 Must Be Strictly Construed

1. RCW 48.30.015 is a “Punitive” Statute

This Court held over a century ago that statutory treble damage provisions, no matter how denominated, are “penal in nature” and, as such, they “should be strictly construed.” *Bailey v. Hayden*, 65 Wash 57,

⁷ The Court need not accept any findings of fact by the district court. In reviewing the issues certified, this Court does not rule in the abstract, but rather based on the certified record before it. *Broughton Lumber Company v. BNSF Railway Corp.*, 174 Wn.2d 619, 624 (2012).

61 (1911) (“all damages above compensatory damages are, in their nature, punitive”). The Court explained:

whether the larger damages be frankly called vindictive damages, or are allowed on the last mentioned ground without any express name, their nature is the same. It is obvious that the increased measure is allowed, not as compensation to the person wronged, but as punishment to the wrongdoer. It is not a mere question of terms, but of the inherent quality of the thing. The increased measure is punitive in its very nature, in that it exceeds the true measure of compensation.

Bailey, 65 Wash at 60.

This holding was reaffirmed just last year in *Broughton Lumber Co. v. BNSF Railway Company*, 174 Wn.2d 619 (2012). The Court reviewed Washington’s timber trespass statute, RCW 64.12.030, which provides treble damages for the cutting down or injuring of trees on the land of another. The Court confirmed: “The timber trespass ‘statute is penal in its nature, not merely remedial. As such it should be strictly construed.’” *Id.* at 633 (quoting *Bailey*, 65 Wash at 61).

The United States District Court for the Western District of Washington has found that “RCW 48.30.015 is an express authorization of punitive damages.” *See Northwestern Mut. Life Ins. Co. v. Koch*, 771 F. Supp. 2d 1253, 1256 (W.D. Wash. 2009). The Western District followed this Court’s direction in *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 577 (1996), where the Court “recognized that the ‘increased

damages' language contained in [the Consumer Protection Act] was an explicit authorization of punitive damages.”⁸ *Id.* at 1256 (citing *Dailey* at 577); see also *Barr v. Interbay Citizens Bank of Tampa*, 96 Wn.2d 692, 700 (1981) (“although some narrow exceptions have been made by the legislature: RCW 19.86.090 (consumer protection act); 19.52.030 (usury); 64.12.030 (trespass to trees, shrubs and timber), punitive damages are contrary to public policy”). This Court should likewise hold that RCW 48.30.015 is a “penal” statute and, therefore, must be strictly construed.

2. RCW 48.30.015 is in Derogation of Common Law

RCW 48.30.015 also must be strictly construed because it is in derogation of common law. See *McNeal v. Allen*, 95 Wn.2d 265, 269 (1980) (“the statute, being in derogation of the common law, must be strictly construed”); *Food Servs of Am. v. Royal Heights*, 69 Wn. App. 784, 787-88 (1993) (“Statutes in derogation of common law must be strictly construed”).

“Since its earliest decisions, this court has consistently disapproved punitive damages as contrary to public policy.” *Dailey*, 129 Wn.2d at 574.

“This court early committed itself to the view that the doctrine of

⁸ Federal courts also have repeatedly found that IFCA does not apply retroactively, including because it is not a “remedial” statute. See, e.g., *HSS Enter’s, LLC v. AMCO Ins. Co.*, 2008 U.S. Dist. LEXIS 11275 (W.D. Wash. Feb. 1, 2008), at **9-10 (“[n]ot only does [the IFCA] create a new cause of action but it also imposes a penalty”) (citation omitted).

exemplary or punitive damages is unsound in principle and that such damages cannot be recovered except when explicitly allowed by statute.” *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879, 883 (1955) (expressing “the repugnance with which this court has persistently viewed the awarding of punitive damages”). “Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation.” *Dailey*, 129 Wn.2d at 574.

B. Plaintiff Has No Actual IFCA Damages Because He Received Payment for His Claimed Damages Prior to Commencing This Action

Plaintiff has no actual damages recoverable under IFCA because he received payment for his claimed damages long before he commenced this action. A plaintiff cannot claim to be owed money that he has already been paid. That is textbook law. This principle is also firmly embedded into the IFCA statutory scheme. First, subsection (1) of IFCA authorizes an insurer to “bring an action to recover actual damages.” RCW 48.30.015(1) (emphasis added). Obviously, a claimant cannot “recover” from an insurer what he has already recovered from that insurer. The “actual damages” language likewise makes clear the legislature’s intent not to allow IFCA actions for “nominal” damages, which is what Plaintiff

would have here because he has already been paid in full his claimed damages.

Second, the legislature's intent to limit recovery under IFCA to cases where the claimant is not paid prior to the commencement of the IFCA action is also embodied in IFCA's notice and cure provision. Subsection 8(a) of the statute expressly requires the claimant to provide twenty day's notice prior to commencing suit. Under subsections (8)(b) and (c), the IFCA action may be brought only if the insurer thereafter "fails to resolve the basis for the action":

(8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner.

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

RCW 48.30.015(8).

"The twenty-day window provides the insurer with an opportunity to cure any deficiencies or violations." *Norgal Seattle P'ship v. Nat'l Sur. Corp.*, 2012 U.S. Dist. LEXIS 55256, at *11 (W.D. Wash. April 19, 2012). The "purpose of the notice provision" is "to allow the insurer to correct violations before suit is filed." *Id.* The original Senate Bill did not

have this notice and cure provision. Subsection (8) was added by House Amendment because of the indisputably harsh consequences to insurers where treble damages are awarded. *See* Appx. 5, House Amendment and Senate Bill Report ESSB 5726, As Amended by House, April 5, 2007.⁹ The Final Bill Report described the notice and cure provisions that were added: “If the insurer does not resolve the claim during the 20-day period, the claimant may then bring suit without further notice to the insurer.” *See* Appx. 6, Final Bill Report, ESSB 5726 at p. 2. The statute, as enacted by the Legislature with the notice and cure provision, originally became effective July 22, 2007. The voters were then given an opportunity in Referendum 67 to approve or disapprove of the statute. The voters approved at the following November 6, 2007 election -- with the “actual damages” language contained in subsection (1) and the statutory notice and cure provisions contained in subsection (8).¹⁰

Read together, the actual damages and notice and cure provisions provide for an award of actual damages only where the insurer has failed

⁹ The House Amendment was offered by Representative Mark Ericks (D - Bothell) and was adopted on April 5, 2007.

¹⁰ The twenty-day cure “window” was and remains important, not only because of the potential for punitive trebling of actual damages, but also because IFCA, as written, does not require any showing of intent and can be based upon an “unreasonable” denial of coverage.

to cure before the IFCA action is commenced.¹¹ If the basis for the cause of action (unreasonable denial of a claim for coverage or delay in payment of benefits) is resolved by reasonable payment of a covered claim or by providing the coverage benefits allegedly withheld before the notice is issued, no actual IFCA damages remain. That is certainly the case where the damages claimed are the amount of benefits previously unpaid.

To hold otherwise would ignore the plain meaning of the language “to recover actual damages” and the notice and cure provisions. *See Broughton Lumber Company*, 174 Wn.2d at 627 (“If a statute’s meaning is plain on its face, we must ‘give effect to that plain meaning as an expression of legislative intent.’ The plain meaning is ‘discerned from all that the Legislature has said in a statute’”) (citations omitted).¹² To find

¹¹ While not before the Court on the certified issue of “actual damages,” an insurer’s payment prior to the IFCA action of what is allegedly owed to the insured would also negate any discretion the trial court could otherwise have to award treble damages. First, there would be no actual damages to treble in the IFCA action. Second, the purpose of the notice and cure provision is to give the insurer an opportunity to avoid treble damages by payment before the claimant files the IFCA action. Where that statutory scheme is followed by the insurer’s payment of what is allegedly owed prior to expiration of the cure period and prior to the filing of the IFCA action, a multiple damage award would be contrary to the purpose and intent of subsection (8).

¹² ““In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry in to the statute’s meaning, in all but the most extraordinary circumstances is finished.” *Federal Aviation Administration v. Cooper*, 566 U.S. ___, 132 S. Ct. 1441 (2012) (Sotomayer, J., dissenting) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). “The legislature may change the common law. However, it is not the prerogative of the courts to amend the acts of the legislature.” *Spokane Methodist Homes v. Department of Labor & Industries*, 81 Wn.2d 283, 288 (1972).

recoverable IFCA damages under these circumstances would render the notice and cure provision superfluous in this case. *See Broughton Lumber Company*, 174 Wn.2d at 634 (“[A] court must not interpret a statute in a way that renders any portion meaningless or superfluous.”); *Svendsen v. Stock*, 143 Wn.2d 546, 555 (2001).¹³

In his Opening Brief, Plaintiff himself stresses in text indented in his Brief for emphasis:

A court must, when possible, “give effect to every word, clause and sentence of a statute.”

Pl. Brief at 15 (quoting *Am. Legion Post No. 149 v. Dep’t. of Health*, 164 Wn.2d 570, 585 (2008)). Yet he apparently asks the Court to ignore completely the notice and cure provisions contained in subsection (8) and how they define and shape any claim “to recover actual damages” under subsection (1).

Here, Plaintiff alleges that the value of his coverage claim was \$62,000 -- the total damages found by the arbitrator to have been suffered by Plaintiff as a result of the car accident. Because that claim was paid in full by Safeco and MOE (in December 2010) long before the expiration of

¹³ For purposes of the certified issue, Safeco is not arguing that the case should be dismissed for failure to give notice prior to commencing the action and thus failure to give Safeco an opportunity to cure. Rather, here the alleged violation was cured by payment prior to receipt of notice. The notice and cure language, like the “actual damages” language, shows that a plaintiff cannot commence an action claiming damages that were already paid.

the IFCA notice and cure period (in June 2011) and long before Plaintiff's commencement of this action (in March 2012), Plaintiff cannot show any actual damages recoverable under the statute. Stated another way, where, as here, an insurer has paid all insurance benefits owed to its insured prior to receiving statutory IFCA notice, prior to the expiration of the twenty-day IFCA cure period, and prior to the commencement of any IFCA claim, the Plaintiff has no actual IFCA damages.

C. Plaintiff Cannot Establish Any IFCA Damages Because Safeco Made a Reasonable Settlement Offer to Plaintiff

Plaintiff also cannot establish any IFCA damages because Safeco extended a reasonable settlement offer to Plaintiff (thus curing any alleged violation), even before Plaintiff's recovery in arbitration was determined.

Safeco offered Plaintiff \$45,000 to resolve his coverage claim.

That settlement offer was communicated on October 26, 2010 prior to the November 2, 2010 arbitration and long before Plaintiff provided statutory IFCA notice and commenced suit. *See* Doc. 26-1, pp. 33-36. It was in a reasonable range, given that Mr. Morella's claimed medical expenses (for his alleged neck injury and his alleged back pain that the arbitrator determined to have not been caused by the accident) totaled less than \$10,000. It also was proven to be reasonable, given the arbitrator's findings, among others, that: (i) Mr. Morella "has recovered from his

injuries”; (ii) Mr. Morella’s claims for alleged economic losses “are fundamentally flawed in many respects”; (iii) the evidence “does not support” Mr. Morella’s claim for “low-back problems, which developed much later on”; (iv) Mr. Morella’s bird hunting trips and active lifestyle; and (v) the increased profitability of Mr. Morella’s landscaping business after the incident.¹⁴ The October 26, 2010 offer, therefore, cured any alleged prior unreasonable settlement offer and further negates Plaintiff’s alleged IFCA damages.

Moreover, that settlement offer was promptly communicated after Safeco received an October 15, 2010 demand letter from Plaintiff, raising for the first time that Safeco was engaging in bad faith and in violation of WAC insurance regulations. There was no reference in Plaintiff’s October 15, 2010 letter to IFCA or to treble damages claims and no IFCA notice was sent at that time to the Insurance Commissioner. But, even if that letter could somehow be construed to constitute IFCA notice (and it cannot), Safeco cured any IFCA violation within eleven days when it offered \$45,000 to resolve Plaintiff’s claim. *See* RCW 48.30.015(8) (“If the insurer fails to resolve the basis for the action within the twenty-day

¹⁴ The mere fact that there is a disparity between the arbitration award and the insurer’s offer does not render the insurer’s offer unreasonable. *See Keller v. Allstate*, 81 Wn. App. 624 (1996).

period after the written notice by the first party claimant, the first party claimant may bring the action”); *Norgal Seattle Partnership v. National Surety Corporation*, 2012 U.S. Dist. LEXIS 55256, at *11 (W.D. Wash. April 19, 2012) (“The twenty-day window provides the insurer with an opportunity to cure any deficiencies or violations.”).

D. Actual Damages Under IFCA Are Limited to Those Proximately Caused By The Statutory Violation And Do Not Include Alleged Belatedly Paid Policy Benefits Or Pre-Existing Personal Injuries

Safeco’s \$45,000 settlement offer and Safeco’s actual payment of the \$62,000 arbitration award prior to any IFCA notice or suit are both dispositive and negate Plaintiff’s alleged damages. Accordingly, the Court need not and should not further consider what hypothetical actual damages might have been awarded, had Plaintiff given prior statutory notice or had Safeco failed to pay the arbitration award.

To the extent the Court determines further review of the issues to be appropriate, the Court should hold that “actual damages” under IFCA are limited to those proximately caused by the alleged statutory violation and do not include policy benefits which were due under the insurance contract or damages for personal injuries that were caused by the accident prior to the denial or delay in payment of any insurance claim. Requiring

direct causation is supported by the language of the statute, this Court's construction of similar statutes, and the common law.

First, the IFCA statute's language provides that a first party claimant "who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained." RCW 43.30.015(1). Read together, the words "actual damages sustained" must be construed to relate to the words that preceded it, actual damages sustained from the "unreasonabl[e] deni[al]" of a claim for coverage or payment of benefits.

Second, similar language in the Consumer Protection Act -- which provides for recovery of "actual damages sustained" -- has been construed to require causation between the alleged wrongful act and the alleged damages. *See Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553 (1992) (CPA violation requires "the existence of a causal link between the deceptive act and the injury suffered"); *Lidstrand v. Silvercrest Indus.*, 28 Wn. App. 359, 368 (1981) (recovery under the CPA requires "a causal relation between the practice engaged in by the defendant and the damages suffered by the plaintiff"). Likewise, this Court has limited "actual damages sustained" from a violation of the Washington Law Against Discrimination, RCW 49.60.180, to those "proximately caused by an unlawful act of discrimination." *Martini v.*

Boeing Co., 137 Wn.2d 357, 368 (1999) (“the usual rules which govern the elements of damages for which compensation may be awarded apply” including proximate cause and mitigation of damages). *See also Blaney v. Int’l Ass’n of Machinists and Aerospace Workers District No. 160*, 151 Wn.2d 203, 216 (2004) (Actual damages are damages “that are proximately caused by the wrongful action, resulting directly from the violation of RCW 49.60”).¹⁵

Third, “actual damages” is a term of art that has been required by courts for recovery under common law bad faith claims. *See, e.g., St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 126 (2008) (insured is “not entitled to a presumption of harm or coverage by estoppel, but must prove all elements of the claim, including actual damages” (emphasis added)). Actual damages for common law bad faith are limited to those proximately caused by the breach of the duty of good faith. *Id.*; *see also Moratti v. Farmers Ins. Co.*, 162 Wn. App. 495, 504 (2011) (“bad faith claim against an insured is analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by the breach”).

¹⁵ Plaintiff’s reference to the WLAD (Pl. Br. at 8-9) also does not support Plaintiff because the WLAD expressly provides that it “shall be construed liberally for the accomplishment of the purposes thereof.” *See Martini*, 137 Wn.2d at 377.

In *Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269 (1998), the Court evaluated “What Remedies are Available to an Insured if its Insurer Has Acted in Bad Faith.” *Id.* at 283-85. The Court held: “[A]n insurer is not liable for the policy benefits but, instead, liable for the consequential damages to the insured as a result of the insurer’s breach of its contractual and statutory obligations.” *Id.* at 284 (emphasis added). It rejected the plaintiff’s argument in that case that the insurer’s bad faith investigation should estop the insurer from denying coverage. That conclusion was reached because “the loss in the first-party situation has been incurred before the insurance company is aware a claim exists.” *Id.* The Court concluded that the plaintiff was able to make a claim for “those amounts and damages normally associated with bad faith and CPA violations,” including the cost of hiring their own experts and investigators and other “financial expense” incurred “as a result of the bad faith investigation.” *Id.* at 285.

A separate concurring opinion likewise explained that there must be “direct” causation between the insurer’s bad faith conduct and the damages claimed: “the majority correctly observes that harm is an essential element of both bad faith and CPA causes of action and that Plaintiff is entitled to recover only to the extent it can establish that it incurred expenses as a direct result of any bad faith on the part of the

Defendant. Therefore, when an insurer breaches its duty to act in good faith, a cause of action exists only if such bad faith causes resulting harm to the insured.” *Id.* at 286 (citation omitted) (emphasis added).

“The legislature is presumed to know the law in the area in which it is legislating, and statutes will not be construed in derogation of the common law absent express legislative intent to change the law.” *Wynn v. Earin*, 163 Wn.2d 361, 371 (2008). Here, IFCA added remedies that are not available under common law bad faith. It provides for a mandatory award of attorney’s fees to a prevailing party and provides for potential trebling of actual damages. But there is no support in the statutory language, its legislative history, or case law to eliminate the requirement that recoverable damages be proximately caused by the alleged wrongful conduct. To the contrary, the legislature’s choice of the words “actual damages sustained” contemplates that courts will require a showing of proximate cause to support a damages claim under IFCA, as required for bad faith claims and as required for CPA claims based on that same language.

Applying principles of proximate cause, it is clear that Mr. Morella cannot recover as “actual damages” the policy benefits allegedly belatedly paid by Safeco or otherwise for his personal injuries caused by the automobile accident. Under standard jury instructions in Washington,

“[t]he term ‘proximate cause’ means a cause which in a direct sequence unbroken by any new independent cause, produces the injury complained of and without which such the injury would not have happened.” 6 Washington Pattern Jury Instructions: Civil 15.01, at 181 (5th ed. 2005) (WPI). This Court has similarly held that “Proximate cause is a cause which in a natural and continuous sequence, unbroken by a new, independent cause, produces the event, and without which that event would not have occurred.” *See Blaney*, 151 Wn.2d at 216 (citation and quotation omitted).

Here, Mr. Morella’s personal injuries and alleged pain and suffering were caused by the car accident before any claim was submitted to Safeco and before Safeco extended settlement offers to Plaintiff. Plaintiff cannot claim that these injuries would not have occurred but for Safeco’s conduct. Similarly, Plaintiff’s claim for policy benefits relating to those injuries pre-dated and existed separately and irrespective of the reasonableness or unreasonableness of the settlement offers extended by Safeco before the arbitration.

Under long-established principles of proximate cause, such personal injuries were, therefore, not caused by the denial of Plaintiff’s insurance claim or any conduct whatsoever of Safeco or its representatives. For example, Plaintiff does not claim that his alleged

neck pain resulted from any failure by Safeco to investigate or settle his insurance claim. Plaintiff does not claim that he visited the chiropractor or received any medical treatment because of any actions by Safeco. Plaintiff does not claim that he was prevented from working by any action of Safeco.¹⁶

Caselaw from other jurisdictions is helpful on this issue. Courts in Massachusetts reviewed the question of what could be awarded as “actual damages” and trebled under a similar statute, Mass. Gen. Laws ch. 93A, when an insurer failed to timely pay a claim. Following principles of proximate causation and the requirement that plaintiff establish actual damages resulting from the wrongful act of the insurer, the courts found that the “amount due under the policies compensates for the injuries caused by the accident.” *Bertassi v. Allstate Ins. Co.*, 522 N.E.2d 949, 953 (Sup. Ct. Mass. 1988). “[D]amages under c. 93A, however, are designed only to compensate for the losses which were the foreseeable consequences of the defendant’s unfair and deceptive act or practices.” *Id.* Thus, an insured was “entitled to damages under G. L. c. 93A, § 9(3), in

¹⁶ Looked at another way, Plaintiff had a pre-existing condition (caused by the car accident) which was neither lit up nor exacerbated by anything that Safeco did (following the car accident). *See Torno v. Hyak*, 133 Wn. App. 244 (2006) (trial court may instruct jury that “there may be no recovery ... for any injuries or disabilities that would have resulted from the natural progression of the preexisting condition even without [the] occurrence”).

the form of interest, for his loss of use of money during those periods the money that was due him remain unpaid.” *Id.* In appropriate cases, that interest could be doubled or trebled, but the payment under the policy on the underlying claim could not. *Trempe v. Aetna Casualty and Surety*, 480 N.E.2d 670, 676 (Mass. Ct. App. 1985) (reversing multiple damage award that was “based on the fire” and not on the unfair acts).¹⁷

In response to these cases, the Massachusetts Legislature amended the statute to expressly provide that where a judgment has been entered on the underlying claim, “actual damages” shall be taken to be the amount of the judgment for purpose of the bad faith multiplication. *See R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 754 N.E.2d 668, 681-682 (Sup. Ct. Mass 2001). The legislature inserted the following into Massachusetts’s multiple damages provision: “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

¹⁷ *See also Rhodes v. AIG Domestic Claims, Inc.*, 961 N.E.2d 1067 (Sup. Ct. Mass. 2012) (“Before 1989, several decisions from this court and the Court of Appeals held that the measure of damages for an insurer’s failure to make prompt, fair and equitable settlement offer were the damages directly caused by the insurer’s conduct -- typically, loss of the use of such funds from the time when the claim should have been paid to the time that a settlement or judgment was paid -- and not the total amount owed under the insurance policy. If the insurer’s conduct was willful or knowing, loss of use damages were doubled or trebled”) (citations omitted).

underlying transaction or occurrence” *Clegg v. Butler*, 676 N.E.2d 1134, 1142 (Sup. Ct. Mass. 1997).¹⁸

When IFCA was enacted, the Washington Legislature could have included language like the 1989 amendment to the Massachusetts statute. It did not. This Court should apply IFCA as it was written, not how Plaintiff or the plaintiff’s bar wants it to be.

In short, Plaintiff’s personal injuries arose from the car accident. They were not proximately caused by any IFCA violation, and the damages awarded by the arbitrator for those injuries are, therefore, not “actual damages” recoverable under IFCA.

E. The Voter’s Pamphlet Does Not Save Mr. Morella’s Flawed Damages Arguments

In an attempt to find authority to support his damages claim where none exists, Plaintiff argues that the Court should review statements contained in the Voter’s Pamphlet in support of Referendum 67 because the IFCA statute is “ambiguous.” Pl. Br. at 16-18. Under principles of strict construction, however, that ambiguity precludes the broad interpretation of the treble damages provision argued by Plaintiff. *See*

¹⁸ Notably, even after the 1989 amendment, Massachusetts courts do not consider an arbitration award or a pre-litigation settlement to be a judgment that may be trebled. Where an arbitration award is entered or settlement is reached, but no judgment entered, the insurer’s statutory claim remains at his or her loss of use value of monies that should have been paid earlier. *See Clegg v. Butler*, 676 N.E.2d 1134, 1142 (Sup. Ct. Mass. 1997) (*discussing Bonofiglio v. Commercial Union Ins. Co.*, 576 N.E.2d 680 (1991)).

Parts A and B, *supra*. The rule of lenity also requires that the ambiguous punitive damages provision be construed in favor of Safeco. *See In re Discipline of Haley*, 156 Wn.2d 324, 347 (2006). “As a general rule, courts apply the rule of lenity to any statute imposing penal sanctions.” *Id.* “[T]he rule of lenity applies to both criminal and quasi-criminal statutes.” *Id.* It is a “venerable canon of statutory interpretation” that requires courts to interpret ambiguous statutes “in the defendant’s favor.” *Id.*

Further, Plaintiff does not identify anything in the Voter’s Pamphlet that supports trebling of the arbitration award paid to Plaintiff. Nothing in the Voter’s Pamphlet voids the notice and cure provisions. Nothing in the Voter’s Pamphlet suggests, let alone clarifies, that treble damages will be based on allegedly belatedly paid policy benefits or the loss in the underlying event that gave rise to the coverage claim.

Plaintiff points to a short statement in support of the legislation, stating: “Without R-67, there is no penalty when insurers delay or deny valid claims. . . . R-67 allows the court to assess penalties if an insurance company illegally delays or denies payment of a legitimate claim.” From this lone statement in favor of the bill, which the legislature would not have seen before enacting IFCA and the voters may or may not have read, Plaintiff argues that the IFCA must be read to provide for penalties in

every IFCA case.

If anything, this Voter's Pamphlet statement serves to confirm that the statute is penal and must be strictly construed against Mr. Morella and in favor of Safeco. The statement is not helpful, however, to resolving the issue before the Court because it provides no explanation of how any court should calculate punitive damages. There is no reference, for example, to trebling of unpaid policy benefits, as Plaintiff would like to do here. Indeed, the reference to penalties is itself vague and ambiguous. While its treble damages provision is "penal," the IFCA statute does not authorize the court to assess fines or other mandatory civil penalties provided by other statutes.

IFCA provides for penal sanctions against an insurer through the trebling of "actual damages," not the imposition of fines or the trebling of presumed damages or policy benefits. The Legislature could have included a mandatory civil penalty provision, as it has in other statutes. It chose instead to allow trebling of actual damages where such damages could actually be proven. IFCA was a controversial statute that signaled a departure from the prohibition in this state against punitive damages. Many argued that it would unnecessarily expand the volume of litigation against insurers, driving premiums up for all consumers. The trebling of actual damages (rather than mandatory civil penalties or presumed

damages) provided one safeguard against unnecessary litigation or runaway verdicts by limiting such sanctions to cases where the insurer's conduct actually caused damage. The potential for trebling of actual damages serves the purpose of punishing and deterring unreasonable conduct by the insurer, while the limitation of that trebling to cases where the insured has actually been damaged by the unreasonable denial avoids the flood of litigation by claimants who were not actually damaged but who might nonetheless pursue litigation in hopes of obtaining the windfall of a civil penalty.

In any event, Plaintiff's argument breaks down because if an IFCA violation occurs, the insured may be entitled to interest as damages for his or her loss of use value. Further, there is no basis to attribute this statement in the Voter's Pamphlet to the intent of the legislature that enacted the statute or the voters that approved it. There are many reasons why voters may have voted in support of or against the Referendum and no way to know how many reviewed this Voter's Statement.

F. Emotional Distress Damages Are Not Recoverable

Emotional distress damages also are not "actual damages" recoverable under IFCA. The issue was recently addressed by the Supreme Court of the United States in *Federal Aviation Administration v. Cooper*, 566 U.S. ___, 132 S. Ct. 1441 (2012). The Supreme Court

construed the words “actual damages,” as used in the Privacy Act, and found that the term does not include damages for mental or emotional distress. The Court explained that the phrase “actual damages” is “ambiguous,” “far from clear,” and that in some contexts, “the term has been used or construed more narrowly to authorize damages for only pecuniary harm.” *Id.* at 1449. Therefore, it found in the context of the Privacy Act, which must be strictly construed because it effectively waives sovereign immunity by allowing recovery from the state, actual damages does not include claims for alleged mental or emotional distress.

The Supreme Court further explained that “‘actual damages’ is a legal term of art, and it is a ‘cardinal rule of statutory construction,’ that, when Congress employs a term of art, ‘it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.’” *Id.* at 1449 (internal citation omitted). The Court looked to other laws, which required a plaintiff to “show actual--that is pecuniary or material--harm.” *Id.* at 1451-2. The Court rejected the plaintiff’s reference to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which Mr. Morella relies on here, and rejected the plaintiff’s argument that recovery for emotional distress constitutes actual

damages “so long as it is proved.”¹⁹

Here too, the IFCA must be strictly construed because it is a penal statute and in derogation of the common law. Likewise, the closest statutory analog to IFCA is the Consumer Protection Act, which does not allow recovery for emotional distress damages as “actual damages.” Moreover, absent a clear mandate from the Legislature, this Court has declined to allow emotional distress damages where the statutory violation does not require proof of a level of fault required for an intentional tort. *See Washington State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wn.2d 299, 321 (1993) (Washington Product Liability Act); *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 768 (1998) (Mobile Home Landlord-Tenant Act).

In the context in which IFCA was written, enacted and approved, including then existing limitations imposed on “actual damages” for other claims, the Legislature could have included a reference to general damages or to emotional distress, or such reference could have been required by voters through the referendum or an initiative process. They

¹⁹ Mr. Morella’s argument leads with a definition of actual damages from Black’s Law Dictionary, even though the Supreme Court of the United States found that the “current version of Black’s Law Dictionary” “only highlights the term’s ambiguity,” and the reference to “tangible damages” in that definition “can be construed not to include intangible harm, like mental and emotional distress.” *Id.* at 1450 & n.4.

did not express their intent to allow recovery and trebling of emotional distress damages, and strict construction of IFCA precludes such recovery now.

This Court, of course, need not reach the issue here. Plaintiff's claim for damages fails in its entirety because Safeco cured any violation prior to receiving IFCA notice and prior to any IFCA suit. *See* Parts A - C, *supra*. “In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry in to the statute’s meaning, in all but the most extraordinary circumstances is finished.” *Federal Aviation Administration v. Cooper*, 132 S. Ct. at 1457 (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

Additionally, Plaintiff simply has no evidence of any objective symptomatology that would be required to be shown if emotional distress damages were recoverable under IFCA. *See Hegel v. McMahon*, 136 Wn.2d 122 (1998) (emotional distress must be reasonable, susceptible to medical diagnosis and proved through medical evidence); *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523 (1994). Plaintiff did not claim any emotional distress in his demand letters to Safeco. He did not submit testimony regarding emotional distress at the arbitration. He did not claim any emotional distress in his IFCA notice, which purported to identify all

of his claimed damages. Emotional distress was not specifically alleged in the Complaint in this case. Plaintiff did not identify emotional distress damages in his first Initial Disclosures (raising them for the first time in Amended Initial Disclosures). There is no evidence that he ever saw a psychiatrist, psychologist or other mental health counselor. Nor would there be any cause here for emotional distress. Plaintiff, himself, delayed in pursuing his claim. Plaintiff obtained the medical treatment he needed. Plaintiff's business increased in profitability following the accident. Plaintiff has no viable claim for emotional distress damages under IFCA.

G. Attorney's Fees and Other Litigation Costs Are Not Actual Damages Under IFCA

Attorney's fees and other litigation "costs" are recoverable by a prevailing plaintiff under IFCA, but are not "damages" that may be trebled. That is clear from the language of the statute, which refers separately to "actual damages" and to "attorney's fees" and other litigation "costs." Indeed, Plaintiff's Brief concedes: "The IFCA §§ .015(1) and (3) appear to treat 'actual damages' and 'costs of the action, including reasonable attorneys' fees and litigation costs' separately, as two different things." Pl. Br. at 14. Plaintiff acknowledges that this is an "apparent dilemma" for him. *Id.* at 15.

Plaintiff seeks to overcome this "dilemma" through a strained

interpretation of the words “in such an action” contained in subsection (3)

of the statute:

(3) The superior court shall, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section award reasonable attorney’s fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

RCW 48.30.015(3) (emphasis added). Plaintiff argues that the words “in such an action” modify or describe the attorney’s fees and costs, so that the award of fees and costs under subsection (3) (which he concedes exists separately from any damages award) is limited to fees and costs incurred in the IFCA action. The words “in such an action,” however, describe the immediately preceding language “to the first party claimant of an insurance party who is the prevailing party.” Thus, where a first-party insurance claimant is the prevailing party in an IFCA action, the court shall award fees and costs.

If the Legislature that enacted IFCA had intended to limit subsection (3) fee and cost awards to expenses incurred only “in the litigation,” the words “in such action” would have been included earlier in the clause. They easily could have written or revised the bill, as follows: “The superior court shall . . . award reasonable attorney’s fees and actual and statutory litigation costs, including expert witness fees [incurred in the

action] to the first party claimant of an insurance contract who is the prevailing party.” They did not and principles of statutory interpretation and strict construction of the punitive damages provisions preclude the Court from broadening “actual damages sustained” in the fashion proposed by Plaintiff.

The better reading of subsection (3), together with the other subsections of the statute, is that the court shall award fees and costs and expert witness fees to a prevailing claimant in an IFCA action. Plaintiff concedes that if he brought his coverage action with the IFCA claim, his attorney’s fees and costs would not constitute IFCA damages. He should not be able to transform those fees and costs into damages that may be trebled simply by invoking the benefits of an arbitration agreement and demanding that the insurer arbitrate.

Plaintiff’s reliance on Consumer Protection Act cases is misplaced. Similar language in the Consumer Protection Act has been construed to distinguish between “actual damages” that may be trebled under the CPA and “the costs of suit, including a reasonable attorney’s fee” that also may be separately awarded where a violation is established. The CPA, like the IFCA, provides that an injured person may bring an action “to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney’s fee.” “The case law is clear”

that “treble damages [under the CPA] may only be based upon actual damages,” and attorney’s fees “do not qualify as actual damages.” *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 555-56 (1992).

In *Coleman v. American Commerce Ins. Co.*, 2010 U.S. Dist. LEXIS 97757 (W.D. Wash. Sept. 17, 2010), the court rejected the plaintiff’s assertion that her litigation expenses were actual damages under either IFCA or the CPA. The Court noted that it “has not found law which supports the Plaintiff’s assertion that the cost of litigation alone is an actual damage which will give rise to a cause of action under the IFCA.” *Id.* at **8-9, *aff’d*. 461 Fed. Appx. 600 (9th Cir. Wash. 2011) (“the district court correctly found that Coleman had no damages to support her claims”).

Contrary to Plaintiff’s argument, the Court of Appeals in *Sorrell v. Eagle Healthcare, Inc.*, 110 Wn. App. 290 (2002), did not hold that attorney’s fees were actual damages under the CPA. Rather, the Court, following *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553 (1992), distinguished between “actual damages” under the CPA, which must be established to recover damages, and “injury,” which must be shown to establish a CPA violation. *Sorrell*, 110 Wn. App. at 298-99. Expenditure of attorney’s fees may constitute injury sufficient to establish

a CPA violation and give rise to the right to recover those attorney's fees or obtain injunctive relief, even though the attorney's fees do not constitute "actual damages." *Id.* Thus, in *Sorrell*, the Court found that the defendant's belated reimbursement to Plaintiff of unused nursing home charges negated any breach of contract or CPA damages claim based on the failure to timely refund the charges. But the plaintiff's CPA claim was allowed to proceed because "damages" are different than "injury," and are not an element of a CPA claim. *Id.*

Panang v. Farmers Ins. Co, 166 Wn.2d 27 (2009) (Pl. Br. at 13), is also inapposite. That case concerned attorney's fees and costs allegedly incurred by plaintiff, Panang, as a result of litigation threats made in a collection notice to collect on an insurance company's subrogation claim against an underinsured motorist. The letter misleadingly represented the amount due by the uninsured motorist as a liquidated debt that the recipient was bound to pay, rather than a potential tort claim that was subject to dispute. The Court found that attorney's fees incurred to understand the collection notice could be potentially recoverable, so long as those claimed investigative expenses were "beyond the expenses of litigating her personal injury claim." *Id.* at 65. In other words, Panang could seek recovery of any added investigation expenses arising from the deceptive litigation threat, but she could not seek recovery of those fees

that would have been incurred in defending the personal injury claim. Here, Safeco never made any litigation threats, and the fees and costs that Plaintiff seeks to characterize as damages are those he incurred proving his underlying UIM policy (personal injury) dispute.²⁰

If Plaintiff had commenced a lawsuit asserting coverage claims with his IFCA claims together in one proceeding, he concedes that he would not have been able to recover attorney's fees as damages in that proceeding. Rather, the attorney's fees would have been potentially recoverable under IFCA as costs. Plaintiff cannot transform those costs into damages simply by arbitrating the value of his coverage claim before commencing the IFCA action.

H. Plaintiff May Not Recover Prejudgment Interest

If Plaintiff had any potential damages recoverable for an IFCA violation (and he does not under the factual record here), they would be limited to payment for his loss of use value. Plaintiff claims that he should have been paid earlier. His damages for that claim, if proven, would be interest from the time he should have received a reasonable offer or have been paid until the time he received a reasonable offer or was

²⁰ *State Farm Ins. Co. v. Huynh*, 92 Wn. App. 454 (2002) (Pl. Br. at 13) is also easily distinguished. That case involved fraud claims by an insurance company against an insured for submitting fraudulent documents.

paid.

Plaintiff cannot recover such interest in this action, however, because he has already been paid in full for any loss of use damages. The arbitration award set Plaintiff's total damages at \$62,000. The district court does "not have jurisdiction to award interest on the arbitrator's award." *Elcon Construction, Inc. v. Eastern Washington University*, 174 Wn.2d 157, 170 (2012). In *Westmark Props., Inc. v. McGuire*, the Court of Appeals held that adding prejudgment interest to an arbitration award was error on the part of the trial court: "[The trial court] has no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits controversy, forbidden territory for the court." *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 404 (1989) (quoted in *Elcon Constr., supra*). "Similarly, in *Flour Daniel, Inc.*, [the Court] noted that the majority of courts considering this issue have found that adding prejudgment interest is an inappropriate modification of the arbitrator's award." *Elcon Constr.*, 174 Wn.2d at 170 (discussing *Dep't of Corr. v. Flour Daniel, Inc.*, 160 Wn.2d 786, 792 (2007)).²¹

It should be noted that "actual damages" awarded to claimants

²¹ Indeed, Plaintiff's Brief makes this point, where he argues that the district court cannot substitute its judgment as to actual damages for that of the arbitrator. See Pl. Br. at 21 (citing *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530-31 (1976)).

under IFCA for loss of use value, if proven, must be distinguished from general notions of statutory prejudgment interest, which is not available under IFCA. Thus, if policy benefits were found to be recoverable as actual damages under IFCA, Plaintiff would not be entitled to interest on that award, let alone trebling of any interest. First, “[i]nterest is generally disallowed when recourse upon a punitive statute is sought.” *Ventoza v. Anderson*, 14 Wn. App. 882, 897 (1976) (citing *Blake v. Grant*, 65 Wn.2d 410 (1964); *Grays Harbor County v. Bay City Lumber Co.*, 47 Wn.2d 879 (1955)). Here again, reference to case law relating to the timber trespass statute is instructive. In *Ventoza v. Anderson*, 14 Wn. App. 882 (1976), the Court of Appeals explained that interest “may not be granted upon either the compensatory or the punitive portion of the award”:

The Washington treble damage statute is penal in character and must be strictly construed. The court held that when recovery is sought under the treble damage statute, which contains no provision for interest, the statute cannot be extended by implication to provide for interest upon any portion of the award. The opinion stands for the proposition that when a plaintiff elects to seek recovery under the treble damages section, only three times the value of the trees wrongfully cut may be recovered, and interest may not be granted upon either the compensatory or the punitive portion of the award.

Id. at 897 (emphasis added) (discussing *Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968)). See also *International Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 10 (1999).

IFCA is a punitive damages statute that provides for trebling of actual damages. It also provides for an award of costs, including attorney's fees. There is no reference in the statute, however, to any award of interest. Because IFCA is penal in character, it must be strictly construed and cannot be extended to provide for statutory prejudgment interest on any portion of the award. *See supra* pp. 16-18; Restatement (Second) of Torts § 913, cmt. d (1977) ("Interest is not allowable as an element in punitive damages").

Third, while statutory prejudgment interest may be available for breach of contract or bad faith claims against an insurer, statutory prejudgment interest is also not recoverable under IFCA because such award would not reflect "actual damages" sustained by the insured from an IFCA violation. Prejudgment interest is a legal construct that presumes a "loss of use" value and presumes the appropriate remedy based on a statutory interest rate. While prejudgment interest has been termed compensatory for this reason, it does not reflect "actual damages."

Finally, statutory prejudgment interest is also not recoverable in this case because the value of Plaintiff's claim was not liquidated until the arbitrator rendered his decision, at which time the award was promptly paid. Generally, "in Washington a party is entitled to prejudgment interest where the amount due is 'liquidated,'" and "a 'liquidated' claim [i]s one

where the evidence furnishes data which, if believed, make it possible to compute the amount due with exactness, without reliance on opinion or discretion.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 685 (2000).²²

V. CONCLUSION

For the reasons stated above, the Court should find that Plaintiff has no recoverable “actual damages” under IFCA because he received payment of his total damages awarded in the arbitration prior to giving statutory IFCA Notice and prior to commencing this action.

RESPECTFULLY SUBMITTED this 18th day of July, 2013.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Kelly P. Corr, WSBA No. 00555
Paul R. Raskin, WSBA No. 24990

Attorneys for Defendant Safeco Insurance
Company of Illinois

²² Plaintiff’s award in the arbitration was chiefly for general damages for his alleged personal injuries and pain and suffering, which required the arbitrator to exercise judgment and discretion. This is clear from the arbitration award, which did not itemize damages and which noted that Plaintiff “has chosen not to seek the recovery of his medical expenses,” that “no specific wage or salary loss is being claimed, as there is none,” and that that Plaintiff’s claim for “earning capacity impairment” “cannot be considered to be truly significant.” Plaintiff’s claims in the arbitration were, therefore, not liquidated.

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Defendant Safeco Insurance Company of Illinois herein.

2. On this 18th day of July, 2013, I caused the document to which this certificate is attached, Brief of Defendant Safeco Insurance Company of Illinois, to be filed with the Clerk of the Supreme Court of the State of Washington, and served upon counsel of record in the manner indicated below:

Michael T. Schein
Sullivan Law Firm
701 Fifth Avenue
Suite 4600
Seattle, WA 98104
mschein@sullivanlawfirm.org
Attorneys for Plaintiff
Via Email and Hand Delivery

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James E. Banks
Bishop Law Offices PS
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ray@bishoplegal.com
james@bishoplegal.com
Attorneys for Plaintiff
Via Email and Hand Delivery

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Sarah L. Eversole
Wilson Smith Cochran Dickerson
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Seattle, WA 98164-2050
silk@wscd.com
eversole@wscd.com
**Attorneys for Defendant Safeco
Insurance Company of Illinois**
Via Email and First Class Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of July, 2013 at Seattle, Washington.


Donna Patterson

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
No. 88706-3
2013 JUL 18 P 3:01
BY RONALD R. CARPENTER
CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN RE:

ENZO MORELLA, Plaintiff,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant.

APPENDIX
TO
BRIEF OF DEFENDANT
SAFECO INSURANCE COMPANY OF ILLINOIS

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
Kelly P. Corr, WSBA No. 00555
Paul R. Raskin, WSBA No. 24990
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
(206) 625-8600

Attorneys for Defendant Safeco
Insurance Company of Illinois

Defendant Safeco Insurance Company of Illinois submits the following documents and non-Washington and unpublished authorities cited in the Brief of Defendant Safeco Insurance Company of Illinois:

Documents:

- No. 1:** Insurance Fair Conduct Act 20-Day Notification Sheet
- No. 2:** Declaration of Jennifer Oudes, Doc. 36
- No. 3:** Motion for Reconsideration, Doc. 34
- No. 4:** Order on Motion for Reconsideration, Doc. 35
- No. 5:** House Amendment and Senate Bill Report ESSB 5726, As Amended By House, April 5, 2007
- No. 6:** Final Bill Report, ESSB 5726

Non-Washington and Unpublished Authorities:

- No. 7:** *Bertassi v. Allstate Ins. Co.*, 522 N.E.2d 949 (Sup. Ct. Mass. 1988)
- No. 8:** *Clegg v. Butler*, 676 N.E.2d 1134 (Sup. Ct. Mass. 1997)
- No. 9:** *Coleman v. American Commerce Ins. Co.*, 2010 U.S. Dist. LEXIS 97757 (W.D. Wash. Sept. 17, 2010)
- No. 10:** *Federal Aviation Administration v. Cooper*, 566 U.S. ___, 132 S. Ct. 1441 (2012)
- No. 11:** *HSS Enter's, LLC v. AMCO Ins. Co.*, 2008 U.S. Dist. LEXIS 11275 (W.D. Wash. Feb. 1, 2008)
- No. 12:** *Norgal Seattle P'ship v. Nat'l Sur. Corp.*, 2012 U.S. Dist. LEXIS 55256 (W.D. Wash. April 19, 2012)
- No. 13:** *Northwestern Mut. Life Ins. Co. v. Koch*, 771 F. Supp. 2d 1253 (W.D. Wash. 2009)

No. 14: *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 754 N.E.2d 668 (Sup. Ct. Mass 2001)

No. 15: *Rayonier, Inc. v. Polson*, 400 F.2d 909 (9th Cir. 1968)

No. 16: *Rhodes v. AIG Domestic Claims, Inc.*, 961 N.E.2d 1067 (Sup. Ct. Mass. 2012)

No. 17: *Trempe v. Aetna Casualty and Surety*, 480 N.E.2d 670 (Mass. Ct. App. 1985)

RESPECTFULLY SUBMITTED this 18th day of July, 2013.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP



Kelly P. Corr, WSBA No. 00555
Paul R. Raskin, WSBA No. 24990

Attorneys for Defendant Safeco Insurance
Company of Illinois

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Defendant Safeco Insurance Company of Illinois herein.

2. On this 18th day of July, 2013, I caused the document to which this certificate is attached, Appendix to Brief of Defendant Safeco Insurance Company of Illinois, to be filed with the Clerk of the Supreme Court of the State of Washington, and served upon counsel of record in the manner indicated below:

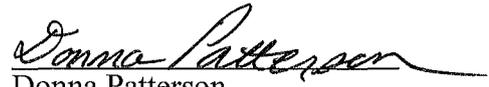
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eversole@wscd.com
**Attorneys for Defendant Safeco
Insurance Company of Illinois**
Via Email and First Class Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of July, 2013 at Seattle, Washington.


Donna Patterson

NO. 1



INSURANCE FAIR CONDUCT ACT

20 DAY NOTIFICATION SHEET

Attn: Office of the Insurance Commissioner Insurance Fair Conduct Act Claim Notification Office Support Unit P.O. Box 40257 Olympia, WA 98504-0257	Submitted by: Name: _____ Law Office: _____ Address _____ _____ Phone _____ Email _____ Date _____
--	--

If you want to sue your insurance company under the Insurance Fair Conduct Act:

- ✓ Complete and submit this 20 day notification sheet stating your intent and its basis to:
 - the insurance company
 - the OIC – *no other documents are required with your submission to the OIC*
- ✓ All information provided to the OIC becomes subject to the public disclosure act. Please do not include any personal or confidential information such as medical records/information, social security numbers, banking information, driver's license information, etc. as we do not use it.
- ✓ Allow three business days for mailing and an additional twenty days before filing your lawsuit.

Insurance Company: _____

Complainant/Insured: _____

Line of Insurance: _____

Reason for claim:

- WAC 284-30-330, "Specific Unfair Claims Settlement Practices Defined";
 - WAC 284-30-350, "Misrepresentation Of Policy Provisions";
 - WAC 284-30-360, "Failure To Acknowledge Pertinent Communications";
 - WAC 284-30-370, "Standards For Prompt Investigation Of Claims";
 - WAC 284-30-380, "Standards For Prompt, Fair And Equitable Settlements Applicable To All Insurers";
 - An unfair claims settlement practice rule adopted and codified in chapter 284-30 of the Washington Administrative Code by the insurance commissioner intending to implement the Insurer Fair Claims Act; or
 - RCW 48.30. _____ for unreasonably denying a claim for coverage or payment of benefits under the Insurance Fair Conduct Act.
 - Other: _____
-
-
-

NO. 2

THE HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ENZO MORELLA, an individual,

Plaintiff,

vs.

SAFECO INSURANCE COMPANY OF
ILLINOIS, a foreign corporation,

Defendant.

No. 2:12-cv-00672-RSL

DECLARATION OF JENNIFER OUDES

I, Jennifer Oudes, hereby declare and testify as follows:

1. I am over the age of eighteen, competent to testify and have personal knowledge of the facts stated herein. This declaration is offered for the purpose of clarifying underlying facts that are relevant to the certification proceedings in the Washington Supreme Court.

2. I am a Claims Team Manager for Safeco Insurance Company of Illinois ("Safeco").

3. Insurance coverage through Safeco and through Mutual of Enumclaw was available to Mr. Morella for the \$62,000 arbitration award that was issued to him. Mutual of

DECLARATION OF JENNIFER OUDES (Cause
No. 2:12-cv-00672-RSL) - 1
slc/SLE1379.082/1245700

WILSON SMITH COCHRAN DICKERSON
A PROFESSIONAL SERVICE CORPORATION
901 FIFTH AVENUE, SUITE 1700
SEATTLE, WASHINGTON 98164-2050
TELEPHONE: (206) 623-4100 FAX: (206) 623-9273

1 Enumolaw ("MOE") advised Safeco that it would pay its 1/3rd pro rata share of the award in the
2 amount of \$20,666.46, leaving Safeco to issue a check for the remaining 2/3rd portion of the
3 award in the amount of \$41,333.54. Safeco claim notes documenting the same are attached as

4 **Exhibit 1.**

5 4. On December 7, 2010, Mr. Morella's attorney, Mr. Bishop, advised Safeco via
6 email that he had received the \$41,333.54 settlement check from Safeco, and on the following
7 day, he confirmed that he had received and accepted the settlement check from MOE. A true
8 and correct copy of the December 7, 2010 and December 8, 2010 emails from Mr. Bishop to
9 Safeco regarding the same are attached as **Exhibit 2.**

10 5. Safeco records show that Safeco settlement check in the amount of \$41,333.54
11 was cashed on December 10, 2010. A true and correct copy of the negotiated check is attached
12 hereto as **Exhibit 3.**

13 **I certify under penalty of perjury under the laws of the State of Washington that**
14 **the foregoing is true and correct.**

15 Signed this 17th day of July, 2013, in Spokane, Washington.

16 By: 
17 Jennifer Oudes

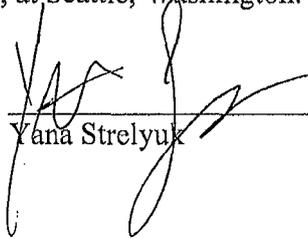
CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on the following via CM/ECF notification.

Primary Attorney for Enzo Morella

James E. Banks
Bishop Law Offices, P.S.
19743 First Ave S.
Seattle, WA 98148
jbanks@accidentsandinjuries.com

SIGNED this 17th day of July, 2013, at Seattle, Washington.



Yana Strelyuk

EXHIBIT 1

Hi Greg,

I spoke to the MOE adjuster. She confirmed that they are paying 1/3 of the 62,000.00 arbitration award. Figures break down as follows. I have issued the check to be sent directly to Bishop Law

MOE – 20,666.46

Safeco – 41,333.54

Jody Burchak

Casualty Specialist II, Claims AM

Mon.- Fri., 8:00-12:00

Direct 509-674-9750

Fax: 888-268-8840

jody.burchak@safeco.com

Confidentiality Statement

The information in this message may be confidential and/or privileged. If you are not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, do not distribute or copy this communication. If you have received this communication in error, please notify us immediately by replying to sender. Thank you for your cooperation.

EXHIBIT 2

Dear Mr. Bishop

This email will confirm the voice mail I just left for you. Thank you for emailing over a copy of the check you received. I see on the front of the check where it says "In full settlement of ARBITRATION AWARD"

I am agreed to you putting a line through "in full settlement of". I hope this resolves your concerns.

Jody Burchak

From: Raymond Bishop [mailto:rbishop@accidentsandinjuries.com]

Sent: Wednesday, December 08, 2010 4:46 PM

To: Burchak, Jody

Subject: RE: Morella v. Safeco: Two Options Acceptable

Dear Ms. Burchak:

I can cross out the verbiage, or we can welcome a field examiner to our office to cross out the verbiage. Because it is such a busy time of year, and I am leaving soon, I do not have time to visit downtown Seattle. Let me know if you can proceed with either of your first two suggestions.

Sincerely,

Raymond Bishop
Attorney for Enzo Morella

From: Burchak, Jody [mailto:Jody.Burchak@Safeco.com]

Sent: Wednesday, December 08, 2010 1:39 PM

To: Raymond Bishop

Subject: RE: Morella v. Safeco & Mutual of Enumclaw: Award Check Issues

Mr. Bishop,

Can you scan the check and email me a copy so I can see what the issue is. These checks are electronically generated. I requested the check be made out as "in pay of arbitration award". We do not generally ask our agents to assist us in claims. If I can see what the issue is then we can come to an agreed. Some possible options:

- you crossing out the verbiage – if it is agreed that it should be crossed out
- I could set up to have a field examiner come by your office
- You bring the check by the claims office in downtown Seattle for it to be crossed out.

I first need to see what the problem is with the check.

Jody

From: Raymond Bishop [mailto:rbishop@accidentsandinjuries.com]

Sent: Wednesday, December 08, 2010 12:49 PM

To: Burchak, Jody; Enzo Morella; Lilya Roraback

Subject: Re: Morella v. Safeco & Mutual of Enumclaw: Award Check Issues

FYI: MOE had settlement language on their check. They crossed it out and mailed it to my office. Pretty easy. I look forward to your solution. Hopefully it will be similarly easy.

Sincerely,

Raymond Bishop
Attorney for Enzo Morella

On Dec 8, 2010, at 12:37 PM, "Burchak, Jody" <Jody.Burchak@Safeco.com> wrote:

I will be leaving for the day and hope to have an answer for you tomorrow morning.

Jody

From: Raymond Bishop [mailto:rbishop@accidentsandinjuries.com]
Sent: Tuesday, December 07, 2010 11:25 AM
To: Burchak, Jody; Greg Worden
Cc: Tami Foster; Michael Taylor; Lilya Roraback; Enzo Morella
Subject: RE: Morella v. Safeco & Mutual of Enumclaw: Award Check Issues

Dear Ms. Burchak and Mr. Taylor:

The Safeco check in the amount of \$41,333.54 arrived today. Please assist with the following two concerns:

- (1) The check contains the "in full settlement of" language that we specifically asked Safeco, and Mutual of Enumclaw, to avoid. The check also has the words "Pollock Insurance Inc" on it. Pollock insurance company in Burien is close (about 2 miles) to my office. I request that Safeco have an agent from a Pollock insurance come to my office today to strike out the inappropriate "in full settlement of" language on the check, and initial the change accordingly. The phone number for Pollock insurance company is: (206) 244-3566.
- (2) The award was for \$62,000.00. We have not received a check from Mutual of Enumclaw. Has an arrangement been made between Safeco and Mutual of Enumclaw for MOE to pay the balance of the award in the amount of \$18,666.46?

Sincerely,

Raymond Bishop
Attorney for Enzo Morella

From: Burchak, Jody [mailto:Jody.Burchak@Safeco.com]
Sent: Tuesday, December 07, 2010 8:20 AM
To: Raymond Bishop; Greg Worden
Cc: Tami Foster; Michael Taylor; Lilya Roraback; Enzo Morella
Subject: RE: Morella v. Safeco & Mutual of Enumclaw

EXHIBIT 3

Check Image Detail

KSHIMK
06/19/2013 13:33:25 CDT

Account Number: 30156650 ACS CHECKING (1) CONTROL

Check Number: 687618

Paid Check Information

Amount: 41,333.54 Date: 12-10-2010

Control Number: 758794996

VERIFY THE AUTHENTICITY OF THIS MULTI-TONE SECURITY DOCUMENT. CHECK BACKGROUND AREA CHANGES COLOR GRADUALLY FROM TOP TO BOTTOM.

Safeco Insurance Safeco Insurance Companies
 Home Office - Safeco Plaza, Seattle, Washington 98185
 Safeco Lloyds Insurance Company
 Home Office - 1600 N. Collins Boulevard, Richardson, TX 75080

No. **687618**
 NOT VALID SIX MONTHS AFTER
 DATE **DEC 4, 2010**

ARBITRATION AWARD

PAY TO THE ORDER OF
BISHOP LAW OFFICES PS & ENZO MORELLA
 19743 1ST AVENUE S.
 SEATTLE WA 98148

AMOUNT **41,333.54** COVERAGE **UM BI** DOLLARS **\$ 41,333.54** CENTS

LOSS DATE: **01-13-06** POLICY **HO1874894** ACS CONTROLLED DISBURSEMENT **3380006**

FORTY-ONE THOUSAND THREE HUNDRED THIRTY-THREE DOLLARS AND 54/100

FOR MORELLA, ENZO-
 INSURED: VERT, ROBERT-
 POLLOCK INSURANCE INC
 02-1250 21A060132173

The Northern Trust Company
 Chicago, IL
 Payable Through Oakbrook Terrace, IL
 NW-1016

AUTHORIZED SIGNATURE

⑈687618⑈ ⑆071923828⑆030156650⑈ ⑆0004133354⑈

THE ORIGINAL DOCUMENT HAS A REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO VIEW WHEN CHECKING THE ENDORSEMENT.

Insurance fraud is a crime punishable by state law. This includes a claim for any receipt of total disability payments while employed.

Fraude de seguro es un crimen castigable de acuerdo a la ley del Estado. Este crimen incluye el recibir reclamos y aceptar pagos de incapacidad total mientras está trabajando.

ALL PAYERS MUST SIGN AND DATE THIS CHECK. ALL ENDORSERS MUST SIGN AND DATE THIS CHECK. ALL ENDORSERS MUST SIGN AND DATE THIS CHECK.

FOR DEPOSIT ONLY
 BISHOP LAW OFFICES, P.S.
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NO. 3

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ENZO MORELLA, an individual,

Plaintiff,

vs.

SAFECO INSURANCE COMPANY OF
ILLINOIS, a foreign corporation,

Defendant.

No. 2:12-cv-00672-RSL

MOTION FOR RECONSIDERATION

**Noted for Consideration:
Friday, April 26, 2013**

I. RELIEF REQUESTED

Pursuant to Local Rule 7(h), Defendant Safeco Insurance Company of Illinois ("Safeco") respectfully requests that the Court reconsider its order entered on Friday, April 12, 2013, set the partial summary judgment order aside, and withdraw the certification issue, because the order and certification issue is based on an erroneous statement of material facts.

1 **II. STATEMENT OF FACTS**

2 The Court should reconsider the facts and basis upon which the Court found an IFCA
3 violation and upon which the question certified to the Washington Supreme Court was based,
4 in consideration of the following key errors:

- 5 • The Court erroneously found that the policy language “compelled” arbitration, and
6 therefore concluded that Mr. Morella was “precluded” from pursuing a suit against
7 Safeco under the procedure set forth under the IFCA. (Court’s order at ECF Doc. No.
8 33, p. 9:10 – 19).
- 9 ○ In fact, the policy provides that either party may request arbitration to resolve a
10 dispute regarding the amount of benefits due. (See Policy language at ECF No.
11 Doc. No. 24, p. 21).¹
 - 12 ○ Mr. Morella demanded arbitration and Safeco agreed to arbitration as the
13 means for resolving his claim. (ECF Doc. No. 26-1, p. 14).
 - 14 ○ The policy did not compel Mr. Morella to demand or submit to arbitration, nor
15 did anything in the policy preclude Mr. Morella from also or instead
16 proceeding with an IFCA complaint setting forth the basis of his dispute and
17 providing Safeco with *twenty days* to resolve the basis of the dispute.

18 The Court’s summary judgment ruling was also based on several key facts that the
19 Court misconstrued:

- 20 • The Court held that Safeco “did not investigate the impact the accident had on Mr.
21 Morella’s daily activities, the extent of his discomfort or impairment, or the scope of
22 the potential claim for lost wages,” and therefore, Safeco’s estimate of general
23 damages did not have a “factual basis.” (ECF Doc. No. 33, p. 7:18). The Court also
states that “Safeco originally valued Morella’s claim at \$11,194.80 - \$15,694.80 at the
time Safeco chose to offer \$1,500 in full settlement.” (ECF Doc. No. 33, p. 7, 3).

These facts and conclusions are erroneous.

- The record shows that in May of 2008, the Safeco adjustor analyzed Mr.
Morella’s UM claim. (ECF Doc. No. 26, p. 6-7). She reviewed the medical

¹ Safeco notes that in the record, the policy cited by the Plaintiff, appears to have the words “may” and “shall” partially obliterated. These words are not obliterated in any copy of the policy provided to Morella by Safeco.

1 records and bills paid by Mutual of Enumclaw ("MOE"), and documented the
2 total amount of medical bills accepted and paid (by MOE) as \$5,151.30. She
3 summarized relevant medical records addressing the onset of symptoms a
4 week after the accident, the aggravation/start of symptoms, Morella's
5 limitations as reported in his records, and the discharge from care by Dr.
6 Leifheit, who noted in part "very little evidence that his MVA-related injuries
7 will give him any more problems" and who recommended Morella stop
8 treatment. (ECF Doc. No. 26, p. 6-7). The adjustor then estimated general
9 damages at \$1,500 to \$3,000. (ECF Doc. No. 26, p. 6).

- 10 ○ The Safeco adjustor then spoke with Mr. Morella on May 13, 2008, about his
11 UIM claim and Safeco's offer of \$1,500. (ECF Doc. No. 26, p. 9). In response,
12 Mr. Morella advised that he wished Safeco to consider additional issues
13 including \$800 - \$900 out of pocket medical expenses not covered by MOE,
14 and wage loss. (ECF Doc. No. 26, p. 14 - 15).
- 15 ○ Safeco immediately explained that it needed specific documentation in order to
16 evaluate these claims. (ECF Doc. No. 26, p. 9, 14 - 15, p. 17). Morella did not
17 provide the requested information despite follow-up requests. (ECF Doc. No.
18 26, p. 17, 20). Safeco did not hear from Morella again until his email of July
19 9, 2008, at which time he indicated only that he had returned for additional
20 treatment and was not ready to close his claim. (ECF Doc. No. 26, p. 13).
- 21 ○ On March 6, 2009, Morella sent Safeco a settlement demand for \$75,000,
22 attaching additional medical records but no wage records, stating that he would
23 "reserve the right to make a wage loss claim." (ECF Doc. No. 26, p. 27).
- Safeco subsequently obtained a medical record review through Mitchell
Medical, which provided a report summarizing the medical issues, the
reasonableness of treatment, and the extent of his reported discomfort or
impairment at each visit. (ECF Doc. No. 26-1, p. 5 - 9). The Safeco adjustor
subsequently evaluated Morella's UM claim using this report as a "records
review." (ECF Doc. No. 26-1, p. 13. The adjustor noted that the amount of
paid medical specials (by MOE not Safeco) was \$9,694.80, and estimated
general damages at \$1,500 to \$4,000, potentially up to \$6,000 based on the
length of treatment, resulting in total potential "exposure" of \$11,194.80 to
\$15,694.80. (ECF Doc. No. 26-1, p. 12 - 13). There is nothing in the record
indicating that the "value" of Morella's claim was the maximum potential
exposure documented by the adjustor.
- The adjustor addressed the case value in the claim note section entitled
"CONCERNS AND VALUE." She noted that the insured had received very
irregular treatment, and that there "has never been any evidence of injury."
(ECF Doc. No. 26-1, p. 13). She noted that the insured owned a landscaping
company that required vigorous physical activity, and that had the insured

1 followed his physician's treatment regimen, it would likely only have been a
2 "1-3 STI at the most." She speculated that the company might have to concede
3 the payment of medical expenses under the UIM provisions (despite the fact
4 that they had already been paid under the PIP provisions) except as to
5 treatment after April 12, 2007, which was unrelated since his orthopedist had
6 told him his injury had resolved. *Id.* The adjustor agreed with the prior general
7 damages estimate of \$1,500 to \$3,000, and thought it possible this amount
8 could go up to \$6K. She then assigned a value of up to \$6K and requested
9 authority up to this amount. (ECF Doc. No. 26-1, p. 13).

- 10 ○ Again, the adjustor could not evaluate any claim for wage loss, because as
11 noted above and in Morella's own demand letter, none of the documentation
12 requested by Safeco to support this claim had been provided.
- 13 ○ Following this evaluation, the adjustor spoke with Morella's attorney about the
14 potential for settlement, and the attorney told her that Morella had decided to
15 demand arbitration under the policy. (ECF Doc. No. 26-1, p. 14).
- 16 ● The Court initially stated in its analysis that "it is not overly persuaded by the fact that
17 Morella was eventually awarded \$62,000 as compensation for his losses..." (ECF
18 Doc. No. 33, p. 7:11-14). The Court also states, however that "Safeco's estimate of
19 general damages in the range of \$1,500 - \$6,000 does not, therefore, appear to have a
20 factual basis (*a conclusion that is supported by the fact that the actual value of
21 Morella's losses, including general damages and lost wages, was much higher*)." (Emphasis added). This statement, and several references to the \$62,000 award
22 throughout the Court's order, indicate that the amount of the award was a fact
23 considered by the Court in its analysis.

In fact, a review of the award itself shows that the arbitration award does not support such a finding:

- 17 ○ Within the award, the arbitrator explains that Morella sustained no wage loss,
18 and that any potential loss of earning capacity impairment was "insignificant."
(ECF Doc. No. 24, p. 45 - 46).
- 19 ○ The arbitrator also agreed with Safeco's conclusion that Dr. Leifheit had
20 determined on April 12, 2007 that Morella had recovered from his injuries, and
21 that Morella's subsequent low back pain, for which he sought treatment from
22 David Scheer, D.C. "was not related to the accident on a more probable than
23 not basis." (ECF Doc. No. 24, p. 45 - 46).
- Finally, the arbitrator concluded that Morella might experience occasional
transient neck stiffness or soreness as predicted by Dr. Leifheit, but these
claimed disabilities are "at most, irregular and not truly debilitating in nature."
Id. at p. 46).

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- o The arbitrator's findings above are consistent with Safeco's own conclusions regarding wage loss, and the relatedness of the low back pain and treatment following April 12, 2007, to the subject accident. Although the arbitrator provided Mr. Morella with a substantial award, this does not establish that Safeco's estimate was without a "factual basis." Rather, it reflects the "vagaries" of arbitration noted earlier in the Court's order.
- The Court's conclusion in the order that the expert reports obtained by Safeco prior to arbitration prior to Safeco's revised settlement offer from \$1,500 to \$45,000 "actually reduced the estimated value of Morella's claim from the value that had been assigned by Safeco's internal handler" is erroneous.
 - o As discussed above, Morella initially refused to provide any documentation of his wage loss to Safeco, precluding evaluation. Once the documents were finally provided, Safeco retained an expert who ultimately provided an earning capacity report that concluded that Morella may have sustained an impaired earning capacity of up to \$1,755. (ECF Doc. No. 26-1, p. 20 – 23). This resulted in an *increase* in the value of Morella's potential economic loss.
 - o Dr. Renninger reviewed the additional medical records released by Morella and concluded in his report that Morella had sustained "cervicothoracic strain," as a result of the accident, that his medical treatment up through his discharge from physical therapy were reasonable and necessary, and that his additional treatment by Dr. Leifheit was possibly related although not necessary. (ECF Doc. No. 26-1, p. 18. This resulted in a value increased from the previously assigned value of \$6,000, which was inclusive of general and special damages, with most or all attributable to general damages. (ECF Doc. No. 26-1, p. 13).

The manifest errors discussed above justify reconsideration of the Court's April 12, 2013 order.

III. AUTHORITY

A. A Court May Reconsider a Ruling Where Matters Were Overlooked or Misapprehended.

Local Rule 7(h) governs motions for reconsideration in this jurisdiction. This rule provides in relevant part:

- (1) Standard. Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or

1 a showing of new facts or legal authority which could not have been brought to its
2 attention earlier with reasonable diligence.

3 (2) Procedure and Timing. . . The motion shall point out with specificity the matters
4 which the movant believes were overlooked or misapprehended by the court, any new
5 matters being brought to the court's attention for the first time, and the particular
6 modifications being sought in the court's prior ruling. . .

7 Local R. Civ. Pro. 7(h)(1) and (2).

8 **B. The Court Should Grant Safeco's Motion for Reconsideration.**

9 A motion for reconsideration is justified under Local Rule 7(h). As set forth in more
10 detail above, the Court erred in its findings as to several material facts upon which it based its
11 finding that Safeco violated the IFCA and WAC 284-30-330(7), and its decision to certify the
12 issue of "actual damages" to the Washington Supreme Court. Correction of these errors
13 would change the Court's conclusions and basis for the Court's rulings on summary
14 judgment, and would also change the factual basis upon which the Court has relied in
15 certifying a question to the Washington Supreme Court.

16 **I. The Court should reconsider its finding of an IFCA violation and the
17 factual basis upon which it certified a question to the Washington
18 Supreme Court.**

19 In the order, the Court erroneously held:

20 It seems clear that, had Morella filed suit seeking both a benefits determination
21 and relief under IFCA upon receipt of Safeco's lowball offer of \$1,500, his
22 "actual damages" in that combined action would likely have been the amount
23 of benefits awarded – \$62,000. Morella was precluded from following that
course of action, however. The insurance policy compels arbitration if the
parties do not agree on the amount of damages involved in an uninsured
motorist claim and there is no indication that the parties agreed to arbitrate an
IFCA claim. Thus, Morella was unable to follow the path set forth by the
legislature when it enacted IFCA. . .

ECF Doc. No. 33, p. 9:10 – 19.

1 This conclusion is erroneous. The policy provides that either party may request
2 arbitration to resolve a dispute regarding the amount of benefits due:

3 A. If we and an insured do not agree:

- 4 1. Whether that insured is legally entitled to recover damages; or
5 2. As to the amount of damages which are recoverable by that
6 insured;

7 From the owner or operator of an underinsured motor vehicle, then
8 the matter may be arbitrated. However, disputes concerning coverage under
9 this Part may not be arbitrated. Arbitration shall begin upon a written demand
10 from either party.

11 ECF No. Doc. No. 24, p. 20 - 21. (underline emphasis added).

12 In this case, *Morella*, through counsel, decided to demand arbitration to determine the
13 amount due under the Safeco policy. ECF Doc. No. 26-1, p. 14. The policy did not compel
14 Mr. Morella to demand or submit to arbitration, nor did anything in the policy preclude Mr.
15 Morella from also or instead proceeding with an IFCA complaint setting forth the basis of his
16 dispute and providing Safeco with twenty days to resolve his dispute.

17 The IFCA provides that a claimant who has been “unreasonably denied a claim for
18 coverage or payment of benefits” may bring an action in the superior court to recover “actual
19 damages” sustained and the costs of the action, *after* first providing “written notice of the
20 *basis for the cause of action* to the insurer and the office of the insurance commissioner” and
21 giving the insurer twenty days to *resolve the basis of the action*. See RCW 48.30.015(8)(a)
22 and (b).² The chapter provides that if the basis of the action (the unreasonable denial of a

23 ² RCW 48.30.015 Unreasonable denial of a claim for coverage or payment of benefits.

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for
coverage or payment of benefits by an insurer may bring an action in the superior Court of this
state to recover the actual damages sustained . . .

1 claim for coverage or payment of benefits) is not resolved by the insurer, the claimant can
2 proceed with a lawsuit under IFCA without further notice. RCW 48.30.015(8)(b).

3 In this case, the Court determined that the basis of Mr. Morella's IFCA complaint was
4 the amount of Safeco's settlement offer and a failure to pay Morella the full value of his
5 insurance benefits due. However, it is undisputed that the IFCA complaint was not even
6 asserted until Mr. Morella had already been fully compensated for his insurance claim under
7 the Safeco insurance policy. See complaint at ECF Doc. No. 8-1, p. 2. Therefore, by the time
8 he asserted a complaint under IFCA, there was no longer any potential "denial of a claim for
9 coverage or a payment of benefits" permitting a cause of action under the IFCA should Safeco
10 fail to cure within twenty days.

11 Permitting Mr. Morella to proceed with an IFCA suit after he was already fully
12 compensated for his claim under the policy would circumvent the Legislature's intent and the
13 provisions of RCW 48.30.015(8)(a) and (b).³ Safeco could not obviously not "cure" the
14 "denial of a claim for coverage or a payment of benefits basis" when the claim had already
15 been paid in full pursuant to the arbitration process. Again, the policy did not compel Mr.
16 Morella to demand or submit to arbitration, nor did it preclude him from also or instead
17 proceeding with an IFCA complaint setting forth the basis of his dispute and providing Safeco

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19 (8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide
20 written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. . .

(b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written
21 notice by the first party claimant, the first party claimant may bring the action without any further notice.

22 ³ No Washington court has construed IFCA's twenty day notice provision. However, when the plain
23 language of a statute is clear and unambiguous, the judicial inquiry into the statute's meaning is complete. See
Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 622 (9th Cir.2005). Moreover, every federal district court to
construe the notice provision has held that the notice provision is mandatory. *Freeman v. State Farm Mut. Auto.*
Ins. Co., C11-761RAJ, 2012 WL 2891167 (W.D. Wash. July 16, 2012) reconsideration denied, C11-761RAJ,
2012 WL 3157117 (W.D. Wash. Aug. 3, 2012).

1 with twenty days to resolve the basis of his dispute, and then pursuing a lawsuit should Safeco
2 fail to resolve the dispute. Accordingly, the Court should reconsider its order finding an
3 IFCA violation as well as its certification to the Washington Supreme Court.

4 **2. The Court should reconsider its summary judgment ruling based on facts**
5 **that were misapprehended or misconstrued.**

6 The Court's summary judgment ruling was also based on material facts that the Court
7 misconstrued. As set forth above, the Court held that Safeco "did not investigate the impact
8 the accident had on Morella's daily activities, the extent of his discomfort or impairment, or
9 the scope of the potential claim for lost wages," and therefore, Safeco's estimate of general
10 damages did not have a "factual basis." ECF Doc. No. 33, p. 7:18. The Court also states that
11 "Safeco originally valued Morella's claim at \$11,194.80 - \$15,694.80 at the time Safeco
12 chose to offer \$1,500 in full settlement." ECF Doc. No. 33, p. 7, 3.

13 These conclusions are erroneous because the record shows that in May of 2008, the
14 Safeco adjustor *did* investigate the impact the accident had on Mr. Morella's daily activities,
15 and the extent of his discomfort or impairment, by reviewing the medical records and billings
16 paid by Mutual of Enumclaw and summarizing those notes that were most relevant to these
17 specific issues. (ECF Doc. No. 26, p. 6-7). The record shows that the adjustor estimated the
18 value of Mr. Morella's general damages as \$1,500 to \$3,000. (ECF Doc. No. 26, p. 6).
19 Following this evaluation, the adjustor spoke with Mr. Morella on May 13, 2008 about
20 settlement, offering \$1,500 in "new money" on his UIM claim, i.e., an amount that
21 represented the net value of the UIM claim, after a setoff for amounts paid under PIP. In
22 response, Mr. Morella advised that Safeco had not considered an additional \$800 - \$900 out
23

1 of pocket medical expenses that Mutual of Enumclaw had not paid, and wage loss. ECF Doc.
2 No. 26, p. 14 - 15.

3 Safeco *agreed* to evaluate the wage loss claim and claim for additional expenses, and
4 specifically advised Mr. Morella of the documentation that it needed in order to do so. (ECF
5 Doc. No. 26, p. 9, 14 - 15, p. 17). It is undisputed that Mr. Morella did not provide the
6 requested documentation. (ECF Doc. No. 26, p. 17, 20).

7 On March 6, 2009, Morella sent Safeco a settlement demand for \$75,000, attaching
8 additional medical records (but no wage records), stating only that he would "reserve the right
9 to make a wage loss claim." (ECF Doc. No. 26, p. 27). Safeco obtained a medical record
10 review through Mitchell Medical, which summarized the medical treatment and the extent of
11 his reported discomfort or impairment at each visit. (ECF Doc. No. 26-1, p. 5 - 9).

12 Using this report as a "records review," the adjustor noted that the amount of paid
13 medical specials (by Mutual of Enumclaw) was \$9,694.80. She estimated general damages at
14 \$1,500 to \$4,000, and potentially up to \$6,000 based on the length of treatment, resulting in
15 total potential "exposure" of \$11,194.80 to \$15,694.80. (ECF Doc. No. 26-1, p. 12 - 13).
16 However, there is no evidence that Safeco considered the maximum potential exposure as
17 representing the reasonable "value" of Mr. Morella's UIM claim. (ECF Doc. No. 26-1, p. 13).

18 After considering the various issues and concerns set forth in her evaluation, the
19 adjustor agreed with the prior general damages estimate of \$1,500 to \$3,000, and thought it
20 possible this amount could go up to \$6,000. She then assigned a value of up to \$6,000 in new
21 money and requested authority up to this amount. (ECF Doc. No. 26-1, p. 13). Following this
22 evaluation, the adjustor discussed the potential for settlement with Mr. Morella's attorney,
23 who advised that Morella had decided to demand arbitration. (ECF Doc. No. 26-1, p. 14).

1 The Court also stated in its order that “Safeco’s estimate of general damages in the
2 range of \$1,500 - \$6,000 does not, therefore, appear to have a factual basis (a conclusion that
3 is supported by the fact that the actual value of Morella’s losses, including general damages
4 and lost wages, was much higher).” As set forth more fully in the facts section above, a
5 review of the award itself shows that the award does not in fact support such a conclusion.

6 Finally, the Court concluded in its order that the expert reports obtained by Safeco
7 prior to Safeco’s revised settlement offer from \$1,500 to \$45,000 “actually reduced the
8 estimated value of Morella’s claim from the value that had been assigned by Safeco’s internal
9 handler.” This conclusion is erroneous. The reports resulted in an increase in the claim
10 evaluation and in an increase in the company’s settlement offer.

11 Mr. Morella initially refused to provide any documentation of his wage loss to Safeco,
12 precluding any evaluation of a claim for wage loss. Once the documents were finally
13 provided, Safeco retained an expert who ultimately provided an earning capacity report that
14 concluded that Morella may have sustained an impaired earning capacity of up to \$1,755.
15 (ECF Doc. No. 26-1, p. 20 – 23). This resulted in an *increase* in the value of Morella’s
16 potential economic loss, as no economic loss was previously recognized.

17 Dr. Renninger’s report also resulted in an increase in the value of Mr. Morella’s claim.
18 He found the medical treatment through his discharge from physical therapy to be reasonable
19 and necessary, and concluded that the additional treatment by Dr. Leifheit was possibly
20 related although not necessary. ECF Doc. No. 26-1, p. 18. This resulted in an increased value,
21 because as noted above, the Safeco adjustor had previously assigned a value of \$6,000
22 inclusive of general and special damages, with all or most attributable to general damages.
23 ECF Doc. No. 26-1, p. 13.

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IV. CONCLUSION

For the reasons set forth above, Safeco requests that the Court reconsider its order entered on Friday, April 12, 2013, and set its partial summary judgment order and certification aside.

DATED this 26th day of April, 2013.

By: s/Sarah L. Eversole
John M. Silk, WSBA No. 15035
Sarah L. Eversole, WSBA No. 36335
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Attorneys for Safeco Insurance Company of Illinois

CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on the following via CM/ECF notification.

Primary Attorney for Enzo Morella

James E. Banks
Bishop Law Offices, P.S.
19743 First Ave S.
Seattle, WA 98148
jbanks@accidentsandinjuries.com

SIGNED this 26th day of April, 2013, at Seattle, Washington.


Stephanie Kim

NO. 4

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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ENZO MORELLA,

9 Plaintiff,

10 v.

11 SAFECO INSURANCE COMPANY OF
ILLINOIS,

12 Defendant.
13

No. C12-0672RSL

ORDER DENYING MOTION FOR
RECONSIDERATION

14
15 On April 12, 2012, the Court granted in part plaintiff's motion for summary
16 judgment and certified a question to the Washington State Supreme Court. Defendant filed a
17 timely motion for reconsideration. Dkt. # 34. Such motions are disfavored in this district. "The
18 court will ordinarily deny such motions in the absence of a showing of manifest error in the prior
19 ruling or a showing of new facts or legal authority which could not have been brought to its
20 attention earlier with reasonable diligence." LCR 7(h)(1).

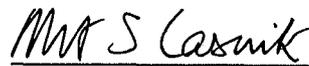
21 Defendant asserts that the Court misconstrued or misapplied the factual record in
22 four ways. It has not, however, shown the type of "manifest error in the prior ruling" that would
23 warrant reconsideration. For the most part, the Court accurately apprehended the existing record
24 and applied the law to those facts. To the extent the Court did err by relying on an inapplicable
25 arbitration agreement when discussing the mandatory vs. permissive nature of the agreement,
26 that discussion was primarily background for the analysis of the phrase "actual damages" as it is

ORDER DENYING MOTION
FOR RECONSIDERATION

1 used in the Insurance Fair Conduct Act. The error was not germane to the outcome of the issue
2 or the formulation of the question to be certified to the Washington Supreme Court.

3
4 For all of the foregoing reasons, defendant's motion for reconsideration and/or
5 amendment is DENIED.

6 Dated this 19th day of June, 2013.

7
8 
9 Robert S. Lasnik
United States District Judge

NO. 5

ESSB 5726 - H AMD TO H IFSCP COMM AMD (H-3265.2/07) 545
By Representative Ericks

ADOPTED 4/5/2007

1 On page 3, after line 31 of the amendment, insert the
2 following:

3 "(7)(a) Twenty days prior to filing an action based on this
4 section, a first party claimant must provide written notice of the
5 basis for the cause of action to the insurer and office of the
6 insurance commissioner. Notice may be provided by regular mail,
7 registered mail, or certified mail with return receipt requested.
8 Proof of notice by mail may be made in the same manner as
9 prescribed by court rule or statute for proof of service by mail.
10 The insurer and insurance commissioner are deemed to have received
11 notice three business days after the notice is mailed.

12 (b) If the insurer fails to resolve the basis for the action
13 within the twenty day period after the written notice by the first
14 party claimant, the first party claimant may bring the action
15 without any further notice.

16 (c) The first party claimant may bring an action after the
17 required period of time in subsection (a) of this subsection has
18 elapsed.

19 (d) If a written notice of claim is served under (a) of this
20 subsection within the time prescribed for the filing of an action
21 under this section, the statute of limitations for the action is
22 tolled during the twenty day period of time in (a) of this
23 subsection."

EFFECT: A first party claimant must give written notice to the insurer and the Office of the Insurance Commissioner twenty days before filing suit. Notice is deemed to be received three business days after it is mailed. The statute of limitation is tolled for the twenty day period.

SENATE BILL REPORT

ESSB 5726

As Amended by House, April 5, 2007

Title: An act relating to creating the insurance fair conduct act.

Brief Description: Creating the insurance fair conduct act.

Sponsors: Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kline and Franklin).

Brief History:

Committee Activity: Consumer Protection & Housing: 2/08/07, 2/15/07 [DPS, DNP].
Passed Senate: 3/13/07, 30-17.

SENATE COMMITTEE ON CONSUMER PROTECTION & HOUSING

Majority Report: That Substitute Senate Bill No. 5726 be substituted therefor, and the substitute bill do pass.

Signed by Senators Weinstein, Chair; Kauffman, Vice Chair; Haugen, Kilmer and Tom.

Minority Report: Do not pass.

Signed by Senators Honeyford, Ranking Minority Member and Delvin.

Staff: Vanessa Firnhaber-Baker (786-7471)

Background: Insurance claims are governed by general principles of contract and tort law, statute, and regulations promulgated by the Insurance Commissioner. If an insurer denies a valid claim, the insured may sue to enforce the insurance contract and force the insurer to pay according to the policy.

An insured may also bring an action against an insurer for acting in bad faith. To succeed on a claim of bad faith, the insured must demonstrate that the insurer's denial of the claim was unreasonable, frivolous, or unfounded. Additionally, an insured may bring a claim under the Consumer Protection Act if the insurer's denial of a claim amounts to an unfair or deceptive trade practice.

By statute, the Insurance Commissioner has the authority to promulgate rules prohibiting unfair and deceptive business practices by the insurance industry. Current insurance regulations require an insurer to attempt in good faith to make a fair, prompt, and equitable settlement of a claim when liability is relatively clear and to generally observe standards of reasonableness in all aspects of its claim settlement practices. The Commissioner may fine an insurer for failure to comply with these regulations.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Engrossed Substitute Bill: Insurers may not unreasonably deny insurance coverage or payment of benefits. First party claimants to an insurance policy may sue insurers for unreasonable denials of coverage or payments of benefits.

First party claimant is defined as an individual, corporation, association, partnership, or any other legal entity who asserts the right to payment as a covered person under the insurance policy at issue.

Damages are available to plaintiffs upon a finding that the insurer unreasonably denied coverage or payment or upon a finding that the insurer violated certain rules adopted by the Insurance Commissioner and published in the Washington Administrative Code that prohibit certain unfair and deceptive business practices in the insurance industry. Upon such a finding, the court must award: (1) the actual damages sustained; (2) reasonable attorney's fees; and (3) actual and statutory litigation costs, including expert witness fees.

The court has the discretion to also increase the total award of damages to an amount that does not exceed three times the actual damages suffered by the plaintiff.

First party claimants are explicitly permitted to bring actions under both the Consumer Protection Act and this bill.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: Washington law places a heavy burden on insureds when they make an insurance claim. They must cooperate and any false statement, regardless of intent, voids the policy. This bill brings parity to the law by requiring insurers to be careful and to act in good faith. If an insured cheats in the insurance claim process it is a felony, if the insurer cheats there are currently no consequences. This bill creates an incentive for insurers to treat claimants fairly. There is currently no practical way for insureds to sue insurers who deny valid claims because insureds do not have the resources to hire lawyers and usually attorneys' fees are not recoverable. Insurers have the financial ability to litigate and intimidate consumers who seek fair payment of claims. The Insurance Commissioner receives quite a few complaints from insureds regarding insurers not paying claims. There are insurers out there that are knowingly underpaying insurance claims.

CON: The bill should not apply to third-party claimants. The common law claim of bad faith already exists in Washington and is commonly used by insureds in litigation. Codifying the common law is dangerous because the courts will assume that the Legislature is intending to broaden the common law bad faith claim. Treble damages are disfavored in Washington. The bill is much too broad because a violation of the Washington Administrative Code includes many acts that are not indicative of bad faith. There is already an incentive for insureds to litigate because plaintiffs who prevail under a bad faith claim are routinely awarded attorney's fees and court costs. This bill will encourage frivolous lawsuits. The increase in litigation

will result in higher insurance rates and insurers abandoning Washington. A similar law was enacted in California and was repealed because it was so problematic.

Persons Testifying: PRO: Larry Shannon, Washington State Trial Lawyers Association; Rob Dietz, Insurance Consultant, expert witness; Karen Koehler, Attorney; Mary Mulcahy, citizen.

CON: Mel Sorensen, Property and Casualty Insurers; Sam Sorich, Association of California Insurance Companies; Gerrit Ayers, Washington Defense Trial Lawyers.

Signed In, Unable to Testify & Submitted Written Testimony: CON: Cliff Webster, American Insurance Association.

House Amendment(s): The reference to the insurance rules that can serve as a basis for treble damages or attorneys' fees is narrowed. The amended bill refers to five existing rules and any additional rules adopted as unfair claims settlement practice rules by the commissioner that are intended to implement the act and codified in chapter 284-30 of the Washington Administrative Code. The five specific rules address the following areas: (1) specific unfair claims practices, (2) misrepresentation of policy provisions, (3) failure to acknowledge pertinent communications, (4) standards for prompt investigation, and (5) standards for prompt, fair, and equitable settlements applicable to all insurers.

The provision that states that the remedies in the bill are separate from any remedies prescribed in RCW 19.86.090 of the Consumer Protection Act is removed. The bill specifically does not limit a court's existing ability to make any other determination regarding unfair or deceptive practices by an insurer or to provide any other remedy available by law.

A claimant must provide 20 days written notice to both the insurer and the Office of the Insurance Commissioner before filing suit under this section. The notice must provide for the basis of the cause of action. If the insurer does not resolve the claim during that 20-day period, the claimant may then bring suit without further notice to the insurer.

Health plans offered by health carriers are exempt from the bill.

NO. 6

FINAL BILL REPORT

ESSB 5726

C 498 L 07
Synopsis as Enacted

Brief Description: Creating the insurance fair conduct act.

Sponsors: Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kline and Franklin).

Senate Committee on Consumer Protection & Housing
House Committee on Insurance, Financial Services & Consumer Protection

Background: Insurance claims are governed by general principles of contract and tort law, statute, and regulations promulgated by the Insurance Commissioner. If an insurer denies a valid claim, the insured may sue to enforce the insurance contract and force the insurer to pay according to the policy.

An insured may also bring an action against an insurer for acting in bad faith. To succeed on a claim of bad faith, the insured must demonstrate that the insurer's denial of the claim was unreasonable, frivolous, or unfounded. Additionally, an insured may bring a claim under the Consumer Protection Act if the insurer's denial of a claim amounts to an unfair or deceptive trade practice.

By statute, the Insurance Commissioner has the authority to promulgate rules prohibiting unfair and deceptive business practices by the insurance industry. Current insurance regulations require an insurer to attempt in good faith to make a fair, prompt, and equitable settlement of a claim when liability is relatively clear and to generally observe standards of reasonableness in all aspects of its claim settlement practices. The Commissioner may fine an insurer for failure to comply with these regulations.

Summary: Insurers may not unreasonably deny insurance coverage of payment of benefits. First party claimants to an insurance policy may sue insurers for unreasonable denials of coverage or payments of benefits.

First party claimant is defined as an individual, corporation, association, partnership or any other legal entity who asserts the right to payment as a covered person under the insurance policy at issue.

Damages are available to plaintiffs upon a finding that the insurer unreasonably denied coverage or payment. A plaintiff may also recover damages upon a finding that the insurer violated one of five rules adopted by the Office of the Insurance Commissioner (OIC) and codified in chapter 284-30 of the Washington Administrative Code (WAC) or any additional rules that the OIC adopts that are intended to implement this act. The five WAC rules regulate insurers' actions in the following areas: (1) specific unfair claims practices; (2) misrepresentation of policy provisions; (3) failure to acknowledge pertinent communications;

(4) standards for prompt investigation; and (5) standards for prompt fair, and equitable settlements.

Upon finding a violation of the act, the court must award: (1) the actual damages sustained; (2) reasonable attorney's fees; and (3) actual and statutory litigation costs, including expert witness fees. The court has the discretion to also increase the total award of damages to an amount that does not exceed three times the actual damages suffered by the plaintiff. A court's ability to make any other determination regarding unfair or deceptive practices or to provide any other available remedy is not limited.

Health plans offered by health carriers are exempt from this bill.

A claimant must provide 20 days written notice to both the insurer and the OIC before filing suit under this section. The notice must provide for the basis of the cause of action. If the insurer does not resolve the claim during that 20-day period, the claimant may then bring suit without any further notice to the insurer.

Votes on Final Passage:

Senate	30	17	
House	59	38	(House amended)
Senate	31	18	(Senate concurred)

Effective: July 22, 2007

NO. 7



RICHARD C. BERTASSI v. ALLSTATE INSURANCE COMPANY

No. Hd-4591

Supreme Judicial Court of Massachusetts, Hampden

402 Mass. 366; 522 N.E.2d 949; 1988 Mass. LEXIS 141

January 5, 1988

May 13, 1988

SUBSEQUENT HISTORY: [***1] As Amended May 17, 1988.

PRIOR HISTORY: CIVIL ACTION commenced in the Superior Court Department on February 11, 1983.

The case was heard by *John F. Murphy, Jr., J.*, on an agreed statement of facts.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

DISPOSITION: *So ordered.*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff insured filed suit under *Mass. Gen. Laws ch. 93A, § 9* (1986), claiming that defendant insurer unfairly and in bad faith refused to make payments under his underinsured motorist provisions. He also claimed breach of contract. The superior court (Massachusetts) awarded treble damages, attorney's fees, and costs. The insurer appealed, and the court, on its own initiative, transferred the case from the appeals court.

OVERVIEW: The insured was injured in an accident with an underinsured motorist. He filed claims against the motorist and two others. The insurer had insisted that the insured sign a trust agreement protecting its subrogation rights before paying underinsurance benefits of \$ 35,000. The court agreed that the insurer had violated *Mass. Gen. Laws ch. 93A, § 2(a)*'s prohibition against unfair practices. However, the court held that the insurer had subrogation rights. The insured had \$ 100,000 in medical expenses, and recovered \$ 10,000 from the motorist and \$ 10,000 each from the other two tortfeasors.

The court ruled that the insured was entitled to the motorist's \$ 10,000 liability insurance plus \$ 35,000. The court added that the \$ 35,000 was first due from the insurer, but the \$ 20,000 from the other tortfeasors was recovered for the insurer's benefit. Noting that the insured did not sustain a loss as a foreseeable consequence of the unfair settlement practice other than the loss of use of the money, the court ruled that he was entitled to damages under *Mass. Gen. Laws ch. 93A, § 9(3)*, for that interest. The court suggested the superior court reconsider multiple damages.

OUTCOME: The court reversed the judgment as to damages, and remanded the case to the superior court.

HEADNOTES

Consumer Protection Act, Insurance, Unfair act or practice, Damages, Attorney's fees. Insurance, Motor vehicle insurance, Unfair act or practice, Subrogation. Damages, Consumer protection case, Interest, Attorney's fees.

SYLLABUS

In an action by an insured seeking contract damages and damages under *G. L. c. 93A, § 9*, against his automobile insurer, in which the plaintiff alleged that the insurer unfairly and in bad faith refused to pay his claims arising under the underinsured motorist provisions of two insurance policies, the judge correctly concluded that the insurer had violated both the plaintiff's contract rights and provisions of *G. L. c. 93A* by its coercive insistence that he execute an agreement protecting the insurer's alleged subrogation rights as a condition precedent to the insurer's payment of the claims where, even though the two policies accorded the insurer certain subrogation

[**2] rights, nothing in the policies entitled the insurer to a separate agreement to that effect. [369-371] ABRAMS, J., concurring.

Where, under subrogation provisions of *G. L. c. 175, § 113L (4)*, as well as under provisions of two automobile insurance policies, an insurer was entitled to recover from its insured any amounts paid pursuant to the \$ 10,000 mandatory underinsured motorist coverage provided by each policy, the amount recoverable by the insured on a contract claim against the insurer, seeking payment of the \$ 35,000 aggregate underinsured motorist coverage of the two policies, was to be reduced by the amount of \$ 20,000 the plaintiff had recovered in settlements from two alleged tortfeasors (other than the underinsured motorist) less the cost of recovering the settlements. [371-372] ABRAMS, J., concurring.

Where, in an action under *G. L. c. 93A*, the Consumer Protection Act, by an insured alleging that his motor vehicle liability insurer unfairly and in bad faith refused to pay his claims arising under the underinsured motorist provisions of two insurance policies, nothing in the record suggested that the plaintiff sustained any loss as a foreseeable consequence of the insurer's [***3] unfair settlement practice other than the loss of use of the money to which he was entitled under the policies, the plaintiff was to recover damages in the form of interest on the money due him. [372] ABRAMS, J., concurring.

On an appeal contesting a judge's assessment of damages in an action under *G. L. c. 93A* by an insured alleging that his motor vehicle liability insurer unfairly and in bad faith refused to pay his claims arising under the underinsured motorist provisions of two policies of insurance, this court remanded the case (1) for findings as to when the insurer's liability to pay the money due under the underinsurance provisions of the two policies was reasonably clear and as to when the plaintiff effectively received a portion of that amount as a result of the settlement of claims against two alleged tortfeasors; (2) for reconsideration of the question of multiple damages which the trial judge had awarded, based at least in part on his incorrect conclusion that the insurer had no repayment or subrogation rights; and (3) for reconsideration of the judge's assessment of an attorney's fee in light of this court's substantial reduction of the plaintiff's damages. [372-374] [***4] ABRAMS, J., concurring.

COUNSEL: *William G. White* (*Kevin D. Withers* with him) for the defendant.

Eugene J. Mulcahy (*Ronald S. Smith* with him) for the plaintiff.

JUDGES: Hennessey, C.J., Wilkins, Abrams, Lynch, & O'Connor, JJ. Abrams, J. concurring.

OPINION BY: O'CONNOR

OPINION

[*367] [**950] The plaintiff seeks contract damages and damages under *G. L. c. 93A, § 9* (1986 ed.), claiming that the defendant, Allstate Insurance Company (Allstate), unfairly and in bad faith refused to make payments to the plaintiff as required by the underinsured motorist provisions of two policies of automobile insurance issued by Allstate to the plaintiff. The case was tried before a judge without a jury on a statement of agreed facts. The judge concluded that Allstate had violated both the plaintiff's contract rights and *G. L. c. 93A* (1986 ed.), by insisting that the plaintiff execute a trust agreement protecting Allstate's alleged subrogation rights as a condition precedent to Allstate's paying underinsurance benefits to the plaintiff. The judge awarded treble damages, attorney's fees, and costs. Allstate appealed, and we transferred the case to [*368] this court on our own motion. We agree with the judge that Allstate violated [***5] the plaintiff's contract rights and *c. 93A*. However, we conclude that the judge's assessment of damages was erroneous. Accordingly, we affirm the judgment in part, we reverse in part, and we remand the case for further proceedings.

The plaintiff sustained serious bodily injury when he was struck by an automobile driven by John Ryan on April 18, 1982. At the time of the accident, the plaintiff had just left the VIP Lounge at 821 Boston Road in Springfield and was walking across Boston Road to a shopping center parking lot where he had parked his automobile. Ryan was driving home on Boston Road from the Harmony Lodge of Elks no. 140, where he was employed as a bartender, and he was intoxicated. As a result of the accident, the plaintiff incurred approximately \$ 100,000 in medical expenses, was permanently disabled, and suffered a substantial loss of income. He brought separate tort actions against Ryan, SMM, Inc., which operated the VIP Lounge, and the Harmony Lodge of Elks no. 140. Ryan carried only \$ 10,000 automobile liability insurance.

[**951] The plaintiff also submitted claims to Allstate, his own automobile insurer, under two policies providing coverage for bodily injury caused [***6] by an underinsured motorist. The limit of underinsurance coverage on one policy was \$ 25,000, and the limit was \$ 10,000 on the other. The relevant language in the two policies is identical. Each policy, under the heading, "Optional Insurance . . . Part 7. Bodily Injury Caused by an Underinsured Auto," provides as follows: "Sometimes an owner or operator of an auto legally responsible for an accident is underinsured. Under this Part, we will pay damages for bodily injury to people injured or killed as a

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result of certain accidents caused by someone who does not have enough insurance.

"We will only pay if the injured person is legally entitled to recover from the owner or operator of the underinsured auto. We consider an auto to be underinsured if the insurance covering the auto or operator is not sufficient to pay for the damages sustained by the injured person. . . .

[*369] "Under this Part, we will only pay if the limits of the responsible person's auto insurance policies, bonds or self insurance are less than the amount of the damages due the injured person. In that case, we will pay the balance of the damages up to the limits shown for this Part on your Coverage Selections [***7] page."

Each policy, in a section entitled "General Provisions and Exclusions . . . 5. Our Right To Be Repaid," also provides: "Sometimes we may make a payment under this policy to you or to someone else who has a separate legal right to recover damages from others. In that case, those legal rights may be exercised by us. Anyone receiving payment under those circumstances must do nothing to interfere with those rights. He or she must also do whatever is necessary to help us recover for ourselves up to the amount we have paid. If we then recover more than we paid, we will pay that person the excess, less his or her proportionate share of the costs of recovery, including reasonable attorneys' fees.

"Sometimes you or someone else may recover money from the person legally responsible for an accident and *also* receive money from us for the same accident. If so, the amount we paid must be repaid to us to the extent that you or someone else recovers. We do not have to be repaid for any money we have paid under Medical Payments (Part 6). Whenever we are entitled to repayment from anyone, the amount owed us can be reduced by our proportionate share of the costs of recovering the money, [***8] including reasonable attorneys' fees." (Emphasis in original.)

Allstate has never contended that Ryan's automobile was not underinsured by at least \$ 35,000. Nevertheless, Allstate agreed to pay the underinsurance benefits to the plaintiff only if the plaintiff would agree in writing to pay back to Allstate "whatever monies are recovered by [the plaintiff] less reasonable attorney's fees and cost from the actions [that were] pending against VIP Lounge and Elks Harmony Lodge." Being unpersuaded that the policies required such reimbursement, the plaintiff refused to execute the proposed agreement. Ultimately, the plaintiff sent Allstate a demand letter relative to each policy pursuant to *G. L. c. 93A, § 9 (3)*. Allstate responded [*370] by reiterating that the aforementioned agreement was a precondition to payment of the plaintiff's claims.

While the matter was under discussion between the plaintiff and Allstate, the plaintiff pursued his tort actions against Ryan, SMM, Inc., and the lodge. The case against Ryan was settled for Ryan's automobile policy limit of \$ 10,000. Also, in October, 1984, the plaintiff and SMM, Inc. (VIP Lounge), settled for \$ 10,000, and in June, 1985, [***9] the case against the lodge was settled for another \$ 10,000.

The parties were not in accord with respect to whether Allstate was entitled to be subrogated to the plaintiff's rights against the VIP Lounge and the lodge. However, soon after the accident, it had become apparent that the tort damages due the plaintiff from Ryan were far in excess of Ryan's \$ 10,000 liability coverage plus \$ 35,000. Thus, the policies' provision that [*952] Allstate would pay the balance of the damages up to the limits shown, required Allstate at that time to pay the full coverage of \$ 35,000 to the plaintiff. Nothing in the policies excused Allstate's performance if the plaintiff were to decline to provide Allstate with a written agreement relative to subrogation rights. This is true even though, as we declare below, the policies entitled Allstate to subsequent reimbursement from the plaintiff's settlements with the VIP Lounge and the lodge. The fact that Allstate was entitled under the policies to subrogation rights does not suggest that Allstate was entitled to a separate agreement to that effect. The judge was correct, therefore, in concluding that Allstate violated the plaintiff's contract rights. [***10]

General Laws c. 93A, § 9 (1), provides, with immaterial exceptions, that any person "who has been injured by another person's use . . . of any method, act or practice declared to be unlawful by section two . . . may bring an action in the superior court . . . for damages . . ." Chapter 93A, § 2 (a), makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. We have no doubt that Allstate's coercive insistence on the plaintiff's signing the proposed agreement, thus capitulating to Allstate's claim of subrogation rights, as a precondition [*371] to Allstate's compliance with the contractual undertaking was unfair within the meaning of *c. 93A, § 2 (a)*.

We come to the question of damages. The judge concluded that the "single damages" to which the plaintiff is entitled are \$ 35,000. He also concluded that the plaintiff is entitled to treble damages, attorney's fees in the sum of \$ 20,000, and costs. Judgment in the sum of \$ 105,000, plus \$ 20,000, plus costs, was entered. The assessment of damages was not correct.

The contract damages are not \$ 35,000. Furthermore, the contract damages are not the [***11] "single damages" for *G.L. c. 93A* purposes. Lastly, it is appro-

priate that, in light of this opinion, the judge reconsider whether the single damages should be trebled and whether the attorney's fees should be reduced. We discuss each of these propositions in turn.

The judge concluded that, because the \$ 35,000 underinsurance coverage, had it been paid, added to the \$ 30,000 the plaintiff recovered from Ryan, the VIP Lounge, and the lodge, would not cover the plaintiff's entire loss, Allstate would not have been entitled to repayment of any portion of the \$ 35,000. We do not agree. Each automobile policy issued by Allstate to the plaintiff was required by *G. L. c. 175, § 113L* (1986 ed.), to provide \$ 10,000 underinsurance coverage. Also, paragraph (4) of § 113L provides: "In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which [***12] such payment is made" Although the underinsurance provisions here were contained in a part of the policies entitled "Optional Insurance," they were nevertheless mandatory in each policy to the extent of \$ 10,000 coverage. Thus, § 113L (4) applies, and Allstate was entitled to the plaintiff's repayment of \$ 20,000, less the cost of recovering it, from the proceeds of the plaintiff's settlement with the VIP Lounge and the lodge.

[*372] Nothing in the policies requires a different conclusion. Rather, the policies, consistent with the statute, provide in the "General Provisions and Exclusions" section, quoted in relevant part above, that if the insured recovers money from Allstate and from others legally responsible for the accident, the amount paid by Allstate must be repaid to the extent of the recovery.

The repayment (subrogation) provisions of *G. L. c. 175, § 113L (4)*, and of the instant policies, do not conflict with apparent legislative objectives. A person in the plaintiff's circumstances is entitled to be compensated to the extent of the applicable automobile liability insurance, plus, as a minimum, an amount equal to the limit of [**953] his underinsurance coverage. Therefore, [***13] in this case, the plaintiff was entitled to Ryan's \$ 10,000 liability insurance plus \$ 35,000. The \$ 35,000 was first due from Allstate, but when the plaintiff recovered an additional \$ 20,000 from the other alleged tortfeasors, that \$ 20,000 was recovered for Allstate's benefit. If the plaintiff had recovered \$ 40,000 from those parties, all but \$ 5,000 would have been recovered for Allstate.

It follows from what has been said that the plaintiff is not entitled to \$ 35,000 contract damages, but rather to \$ 15,000 plus the cost of recovering \$ 20,000 in settlements. That figure is without interest, which we deal with below in conjunction with the c. 93A claim.

The amount due under the policies compensates for the injuries caused by the accident. Single damages under c. 93A, however, are designed only to compensate for the "losses which were the foreseeable consequences of the defendant's unfair and deceptive act or practice." *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 101 (1983). *Wallace v. American Mfrs. Mut. Ins. Co.*, 22 Mass. App. Ct. 938, 940 (1986). There is nothing in the record here that suggests that the plaintiff [***14] sustained a loss as a foreseeable consequence of Allstate's unfair settlement practice other than the loss of use of the money to which he was entitled under the policies. The plaintiff, then, is entitled to damages under *G. L. c. 93A, § 9 (3)*, in the form of interest, for his loss of use of money during those periods the money that was due him remained unpaid. On [*373] remand, findings should be made as to when Allstate's liability to pay \$ 35,000 was reasonably clear and as to when the plaintiff effectively received \$ 20,000 of that amount as a result of the settlement of his claims against the VIP Lounge and the lodge. The plaintiff's single damages under *G. L. c. 93A, § 9 (3)*, consist of interest at a fair rate on \$ 35,000 from the time that that sum should have been paid until the date of judgment, reduced by the interest at a fair rate on the plaintiff's net recoveries (taking into account recovery costs) from the VIP Lounge and the lodge from the time or times the plaintiff received those sums until judgment.

Interest may not be awarded twice, once on the contract claim and again on the c. 93A claim. *Calimlim v. Foreign Car Center, Inc.*, 392 Mass. 228, 235-236 (1984). [***15] It should be awarded under the c. 93A claim, *id.*, and, as provided by *G. L. c. 93A, § 9 (3)*, recovery shall be "up to three but not less than two times [the interest amount] if the court finds that the use or employment of the act or practice was a willful or knowing violation of [*G. L. c. 93A, § 2*] or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two." The judge's discretionary trebling of damages appears to have been based at least in part on his conclusion that the defendant had no repayment or subrogation rights. In light of our decision that that conclusion was incorrect, we think the interests of justice would be best served by the judge's reconsideration of the multiple damages question. We intimate no opinion of our own on that question.

Lastly, it appears that the judge's assessment of \$ 20,000 attorney's fee should also be reconsidered. Again

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we intimate no view with respect to what the assessment should be, but we recognize that, ordinarily, one of the factors to be considered in an award of attorney's fees is the amount of the over-all recovery. *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979). [***16] As a result of our decision, the amount of the plaintiff's damages has been substantially reduced. Of course, we also are mindful of the principle that "[t]he evolution of c. 93A has shown that there is a benefit to the public where deception in [*374] the marketplace is brought to light (and thereby corrected) by an individual who has been deceived even though his actual damages were not proved." *Trempe v. Aetna Casualty & Sur. Co.*, 20 Mass. App. Ct. 448, 458 (1985).

[**954] The judgment is affirmed with respect to the defendant's contractual and c. 93A liability. The judgment is reversed as to damages, and the case is remanded to the Superior Court for further proceedings consistent with this opinion. The judge, in his or her discretion, may award appellate attorney's fees. See *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 272 (1985).

So ordered.

CONCUR BY: ABRAMS

CONCUR

ABRAMS, J. (concurring).

I concur with the court's conclusion that the terms of the insurance policy require subrogation. I write separately to emphasize certain factors that the trial judge may consider regarding multiple damages and attorney's fees.

The court has left [***17] open on remand the issue of multiple damages, because the judge's award of treble damages may have been based on Allstate's assertion of its subrogation rights. I do not agree. As I read the judge's findings and conclusions, the award of treble damages was based on the character of Allstate's viola-

tion of c. 93A, and not on its assertion of subrogation rights. The judge found that Allstate had several alternative methods available to protect its rights in the subrogation dispute, including the plaintiff's offer to place the contested proceeds in escrow pending a judicial decision. Nevertheless, the judge found that Allstate chose "to withhold payment of its legal obligation," and attempted "to force [the] plaintiff to accept Allstate's interpretation of the contract and the law." The dispute continued over a two and one-half to three-year period, and the judge found that Allstate, during this period, "[m]aintain[ed] its position of withholding payment of an acknowledged liability of \$ 35,000 to a seriously injured and incapacitated plaintiff when its right to subrogation could have [*375] been more than adequately protected by other means . . ." The judge's findings and award [***18] of treble damages indicate "that the trial judge made a determination that [Allstate] acted 'wilfully' or 'knowingly'" in violation of c. 93A. See *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 578 n.13 (1986). Our resolution of the dispute in Allstate's favor does not alter the character of Allstate's violation of c. 93A.

As regards the assessment of attorney's fees, the court correctly notes that the judge should consider the amount of the over-all recovery. However, this is only one factor. "[T]he judge on remand should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979). "The amount of reasonable attorneys' fees under c. 93A is within the broad discretion of the trial judge," *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 106 (1983), and will be upheld absent an abuse of [***19] such discretion. See *id.* As I read today's opinion, there is no suggestion that the award for the trial proceedings in any way constituted an abuse of discretion. The judge merely is directed to reconsider the award in light of the court's opinion.

NO. 8



JAMES A. CLEGG & another ¹ vs. JEFF L. BUTLER & others. ²

¹ Katherine M. Clegg.

² Louis C. Butler, Helene M. Butler, and Utica Mutual Insurance Company.

SJC-07216

SUPREME JUDICIAL COURT OF MASSACHUSETTS

424 Mass. 413; 676 N.E.2d 1134; 1997 Mass. LEXIS 64

January 6, 1997, Argued

March 12, 1997, Decided

SUBSEQUENT HISTORY: [***1] Counsel Corrected January 19, 2004.

PRIOR HISTORY: Middlesex. Civil action commenced in the Superior Court Department on February 1, 1993. The case was heard by Hiller B. Zobel, J. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Case remanded to Superior Court for redetermination of damages in accordance with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Personal injury plaintiffs, husband and wife, and defendant insurer sought review of an order from the Superior Court (Massachusetts), which awarded plaintiffs treble damages based on a settlement reached with the insured prior to the trial on the issue of the insurer's unfair settlement practices and denied as moot the insurer's motion for entry of judgment against the insured.

OVERVIEW: The husband was injured when the insured's vehicle struck his vehicle in a head-on collision. Plaintiffs subsequently settled their suit against the insured and a bench trial was held on the claims against the insurer for its unfair settlement practices in violation of *Mass. Gen. Laws ch. 176D, § 3(9)(f)*. The trial judge awarded plaintiffs treble damages and the insurer appealed. Plaintiffs appealed the trial court's denial of their motion for entry of judgment. On appeal, the court held

that (1) plaintiffs were entitled to seek recovery under *Mass. Gen. Laws ch. 93A, §9* as third-party claimants; (2) plaintiffs were adversely affected by the unjust delay in settling the claim; and (3) the insurer breached its duty to settle under ch. 93A. However, the court held that the trial court erroneously awarded plaintiffs treble damages, finding that there was no judgment on which to base the treble damages, as the matter was settled. Accordingly, the case was remanded to the trial court for a determination of the correct measure of damages.

OUTCOME: The court affirmed the trial court's judgment in favor of plaintiffs, reversed the grant of treble damages to plaintiffs, and remanded the case to the district court for further proceedings on the issue of damages.

HEADNOTES

Insurance, Motor vehicle insurance, Settlement of claim, Unfair act or practice. Consumer Protection Act, Insurance, Damages, Offer of settlement, Unfair or deceptive act.

COUNSEL: John G. Ryan (Stimpson B. Hubbard with him) for Utica Mutual Insurance Company.

David W. White-Lief (Marc L. Breakstone with him) for the plaintiffs.

Thomas R. Murphy & James T. Scamby, for Louis C. Butler & another, were present but did not argue.

Edward T. Hinchey & Miles W. McDonough for Amica Mutual Insurance Company & another.

Frederic N. Halstrom & John J. St. Andre, Jr., for Massachusetts Academy of Trial Attorneys.

Erik Lund & Jeffrey S. Brody for New England Insurance Company.

JUDGES: Present: Wilkins, C.J., O'Connor, Greaney, Fried, & Marshall, JJ. O'CONNOR, J. (dissenting).

OPINION BY: FRIED

OPINION

[*414] [**1136] FRIED, J. These cross appeals in this case arise from a claim brought by the plaintiffs against the defendant insurer, Utica Mutual Insurance Company (Utica), alleging unfair settlement practices in violation of *G. L. c. 176D, § 3 (9) (f)*, and seeking damages under *G. L. c. 93A, § 9 (3)*.³ Finding Utica liable on this count, the [***2] judge awarded the plaintiff James A. Clegg treble damages based on a settlement reached with the insured prior to the trial. The insurer appeals from this damage award. As to the settlement, the parties reached a stalemate as to how the claims were to be closed out. The plaintiffs filed a motion for entry of judgment against the Butlers. This motion was denied as moot, and the plaintiffs appealed. We granted Utica's application for direct appellate review. We affirm the judgment in part, we reverse in part, and we remand the case for further proceedings.

3 *General Laws c. 93A, § 9 (1)*, specifically provides that "any person whose rights are affected by another person violating the provisions of [*G. L. c. 176D, § 3 (9)*] may bring an action." See *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 754, 610 N.E.2d 912 (1993); *Trans-america Ins. Group v. Turner Constr. Co.*, 33 Mass. App. Ct. 446, 452, 601 N.E.2d 473 (1992).

I

On May 4, 1991, James Clegg was seriously injured in a two-car [***3] automobile accident after the vehicle driven by Jeff Butler struck Clegg's automobile in a head-on collision. Butler's vehicle was insured by Utica under a policy issued to his parents which insured bodily injuries up to a limit of \$ 250,000 per person. The Butlers also had coverage pursuant to an excess liability policy issued by [**1137] Merrimack Mutual Insurance Co. (Merrimack) which had a policy limit of \$ 1,000,000.

[*415] Shortly after the accident, Utica became aware that the Cleggs were represented by counsel. Utica promptly began an investigation of the accident and, according to the judge's detailed findings, quickly determined that its insured was clearly at fault in the accident. In June, 1991, Utica scheduled an independent medical examination of Clegg to investigate the extent of his injuries but because the orthopedic specialist performing the examination lacked medical information concerning Clegg's care and treatment history, Utica did not consider the evaluation accurate or helpful. Utica never sought an additional independent medical examination of Clegg.

In June and November of 1991, and December, 1992, Utica hired investigators to conduct surveillance and "activity checks" [***4] on Clegg. Contrary to its own policies which prohibited interviewing claimants represented by counsel, Utica did not inform any of the investigators that the Cleggs had hired an attorney and thus both Clegg and his wife were approached and interviewed as part of these investigations. After the first investigation in July, 1991, an investigator told Utica that this was a serious case that appeared to be a "long term, total disability case" and recommended that Utica make sure its reserves were sufficient to cover the claim.

The Cleggs presented their first settlement demand to Utica on September 20, 1991, in which they asked for \$ 200,000. As part of the settlement demand and pursuant to requests by the insurer, the Cleggs provided Utica with numerous medical records. Utica did not respond to this demand for settlement. On January 23, 1992, the Cleggs sent a demand letter to Utica, claiming that Utica was violating its obligation to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear" under *G. L. c. 176D, § 3 (9) (f)*. The letter demanded relief under *G. L. c. 93A* and made a new settlement demand in the amount of \$ 750,000. Utica's [***5] response was dated February 20, 1992. It included no settlement offer, denied any violations of *G. L. c. 176D* or *G. L. c. 93A*, and requested additional medical records which were said to be part of a "long outstanding request" for information regarding a former back injury. The Cleggs's attorney responded by letter four days later, in which he provided new copies of the requested records and notified Utica that these records had already been provided to Utica [*416] the previous October. Utica did not request any additional medical information on this matter following this response.

In March, 1992, Utica retained a neurologist to review Clegg's medical records, and he concluded that Clegg's injuries were causally related to the accident with Butler. In mid-April, Utica requested additional medical information which was provided over the course of the next month along with new medical data as they became

available. In June, 1992, Utica's claims managers recommended raising the policy reserve to the policy limit of \$ 250,000 and recommended authorization to settle the case at this limit. Although the judge found that Utica's home office accepted these recommendations within days, Utica did [***6] not present the Cleggs with a settlement offer until the beginning of July, at which time the Cleggs were presented with a series of structured settlements, each having a present value of less than \$ 175,000. The Cleggs rejected these offers and commenced action against the Butlers and Utica in February, 1993, after having raised their settlement demand to the combined policy limits of \$ 1.25 million in October, 1992. Utica retained an attorney to represent the Butlers. In the course of his investigation this attorney determined that the probable value of the case exceeded Utica's policy limit and in September and November of 1993, he recommended that Utica offer the Cleggs \$ 250,000 in settlement, characterizing potential damages as "astronomical." Despite these recommendations, a second settlement offer was not forthcoming until a mediation session was conducted in May, 1994, just prior to the commencement of the scheduled trial. At that time, Utica finally offered the full \$ 250,000, after which the excess insurer agreed to pay \$ 425,000, and the parties agreed to settle for a combined amount of \$ 675,000.

[**1138] The Cleggs's allegations of unfair settlement practices on the part of Utica [***7] were not relinquished by this settlement. Following a jury-waived trial on this matter, the judge ruled that Utica had violated *G. L. c. 176D, § 3 (9) (f)*, by failing to effectuate a prompt, fair, and equitable settlement of a claim in which liability was reasonably clear. According to his findings, "Utica knew or should have known that [Clegg] was permanently and totally disabled" by June, 1992. The judge ruled Utica's failure to extend a settlement offer in response to the Cleggs's demand letter violated *G. L. c. 93A, § 9*, and that this violation continued as Utica failed to offer its policy limits to the Cleggs despite his finding that "Utica possessed sufficiently adequate documentation to warrant" such an offering. He found that Utica did not need nor reasonably attempt to obtain further medical information, and instead "provoked unnecessary litigation in the faint hope of discovering damaging information" although it could not have had a reasonable belief that such information existed. Pursuant to these conclusions, the judge entered judgment for Clegg in the amount of \$ 250,000 which he then trebled under the provisions *c. 93A, § 9*, for wilful and knowing violations. Attorney's [***8] fees in the amount of \$ 150,000 were also awarded.

In the meantime, a disagreement had arisen in the settlement process as to how the claims against the Butlers were to be extinguished. After the Butlers' attorney

refused to sign a settlement release denoted "Agreement for Judgment," the Cleggs's attorney drafted another release which provided, among other things, "that an appropriate judgment upon the underlying bodily injury claims in the total amount of [\$ 675,000]" would be filed in the trial court. The Cleggs signed this release and forwarded it to the Butlers' attorney who then forwarded the check for \$ 425,000 from the excess insurer. Utica's counsel notified the Butlers' counsel that they objected to the judgment language contained in the release. The Butlers' attorney repeated this objection when he sent Utica's check for \$ 250,000 to the Cleggs. Although the settlement had been paid in full, there remained a dispute as to whether the parties had agreed that an agreement for judgment would be executed and filed. Because the Cleggs refused to enter into a stipulation of dismissal, they moved for an entry of judgment. When this motion was denied, the Cleggs moved for reconsideration; [***9] the motion for judgment was again denied. Following the conclusion of the trial on the *c. 93A* claims, on a motion by Utica, the judge allowed a motion dismissing the Cleggs's complaint against the Butlers.

II

A

Contesting its liability to the Cleggs, Utica argues that the Cleggs, as third-party claimants to the Butler's insurance policy, cannot recover against the insurer for its failure to effectuate [*418] a settlement under *G. L. c. 176D, § 3 (9) (f)*. This statute provides that it is an unfair claim settlement practice for an insurer to fail "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." The crux of Utica's argument is that liability cannot be considered "reasonably clear" if either fault or damages are still contested. While we agree that liability is not "reasonably clear" if it is still the subject of good faith disagreement, we reject Utica's conclusion that, when the plaintiff is a third party rather than the insurer's insured, the insurer owes no duty to the third-party claimant under this statute "until both liability and damages have been determined in an appropriate, legal forum or agreed upon."⁴

4 Utica concedes that an insurer might incur an obligation to the third-party claimant if the insured and the third party conclude a settlement between themselves and thereafter the insurer unreasonably refuses to pay its share under that settlement.

[***10] Under Utica's interpretation, a third-party claimant has no right to a settlement offer by the insurer under this statute prior to a trial or entry of judgment. This proposition is without merit. Utica itself acknowl-

edges that our case law permits third-party claimants such as the Cleggs to bring actions against liability insurers who violate *G. L. c. 93A*. In *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 675, 448 N.E.2d [**1139] 357 (1983), we observed that *G. L. c. 93A, § 9 (1)*, provides that "any person whose rights are affected by another" party's violation of *G. L. c. 176D, § 3 (9)*, is entitled to bring an action under c. 93A (emphasis supplied). This broad language entitles any plaintiff to recover under c. 93A, § 9, if his rights are adversely affected or if he suffers "injury" because of another party's breach of his statutory duty. *Id.* In this context, "injury" simply refers to "the invasion of any legally protected interest of another." *Leardi v. Brown*, 394 Mass. 151, 159, 474 N.E.2d 1094 (1985), quoting *Restatement (Second) of Torts § 7* (1965). The text of *G. L. c. 93A, § 9 (1)*, and our interpretation in *Van Dyke* are both clear affirmations [***11] of third-party rights, and we cannot accept Utica's argument that only insureds are owed a duty of fair dealing when it comes to an insurer's settlement practices. See S. Young, Chapter 93A and the Insurance Industry § 14.04, Chapter 93A Rights and Remedies (Mass. Continuing Legal Educ. 1996 & Supp. 1996). See also *Flattery v. Gregory*, 397 Mass. 143, 150, 489 N.E.2d 1257 (1986) [*419] (holding that third-party claimants are intended beneficiaries under optional automobile liability insurance policies).

The duty of fair dealing in insurance settlement negotiations is established by statute under *G. L. c. 176D, § 3 (9)*, and the specific duty contained in subsection (f) is not limited to those situations where the plaintiff enjoys contractual privity with the insurer.⁵ The statutes at issue were enacted to encourage the settlement of insurance claims, see *Thaler v. American Ins. Co.*, 34 Mass. App. Ct. 639, 643, 614 N.E.2d 1021 (1993), and discourage insurers from forcing claimants into unnecessary litigation to obtain relief. This goal of facilitating settlement is equally desirable whether the plaintiff is an insured or a third-party claimant, and c. 93A, § 9 (1), confers [***12] standing where there is injury resulting from another's unlawful acts. Standing does not depend on a party's status as an insured or a third-party claimant.

5 Perhaps attempting to buttress its argument that third-party claimants are not protected under c. 176D, § 3 (9), Utica notes that subsection (g) creates no rights in persons other than the insured, see *Jacobs v. Town Clerk of Arlington*, 402 Mass. 824, 829, 525 N.E.2d 658 (1988), and observes that other clauses can be read the same way. We note, however, that subsection (g), by its text, is explicitly restricted to insureds. There is no such limiting language contained in subsection (f), a clause which we read to apply to any party whose legal interests might be adversely af-

ected by an insurer's failure to effectuate settlement where liability is reasonably clear. See M.C. Gilleran, *The Law of Chapter 93A § 9:28* (1989 & Supp. 1996).

It is Utica's further contention that, because the Cleggs and the Butlers eventually entered into a settlement, [***13] which the Cleggs denote as "fair and equitable," that the Cleggs were not adversely affected or injured by Utica's actions. Whether a settlement is eventually reached or not, unjust delay subjects the claimant to many of the costs and frustrations that are encountered when litigation must be instituted and no settlement is reached. Moreover, when an insurer wrongfully withholds funds from a claimant, it is depriving that claimant of the use of those funds. "This is precisely the type of damage we have described as appropriately being subject to multiplication in an action . . . under c. 93A." *Schwartz v. Rose*, 418 Mass. 41, 48, 634 N.E.2d 105 (1994).⁶

6 We note that the settlement here explicitly reserved the Cleggs's right to proceed against Utica for c. 93A damages and thus these claims were not extinguished by the settlement.

[*420] B

Violation of duty to settle. Utica claims that, even if the Cleggs have a cause of action under *G. L. c. 93A*, Utica did not breach its obligations under the statute. [***14] Utica contends that the judge made erroneous findings of fact, without which no violation of *G. L. c. 93A* could be found. We will not disturb a judge's findings of fact in a c. 93A claim unless those findings are clearly erroneous, *Bressel v. Jolicoeur*, 34 Mass. App. Ct. 205, 211, 609 N.E.2d 94 (1993), citing *Service Publications, Inc. v. Goverman*, 396 Mass. 567, 578 n.13, 487 N.E.2d 520 (1986), and here they are not.

Utica's first factual disputes challenge the judge's finding that Utica's response to the Cleggs's demand letter of January 23, [**1140] 1992, "was inadequate, constituted statutory unfairness and deception," and that "Utica's failure to make an offer of settlement until July 3, 1992, violated the statute." Our standard for examining the adequacy of an insurer's response to a demand for relief under *G. L. c. 93A, § 9 (3)*, is "whether, in the circumstances, and in light of the complainant's demands, the offer is reasonable." *Calimlim v. Foreign Car Ctr., Inc.*, 392 Mass. 228, 234, 467 N.E.2d 443 (1984), citing *Kohl v. Silver Lake Motors, Inc.*, 369 Mass. 795, 343 N.E.2d 375 (1976). In this case, there was no offer contained in Utica's response. In [***15] their demand letter, the Cleggs described the unfair or deceptive acts they were alleging and the injury suffered, as required by *G. L. c. 93A, § 9 (3)*, and requested settlement in the amount

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of \$ 750,000 -- an amount the judge found to be "objectively reasonable." Utica summarily denied any basis for liability under c. 93A and requested medical records the judge determined it had already received.⁷

⁷ We note that in order to encourage settlements, a demand letter under c. 93A, § 9 (3), serves two purposes. Besides providing an insurer notice regarding a claim, it also provides the insurer with a means to limit liability by making a reasonable offer of settlement within thirty days following receipt of the demand letter. See M.C. Gilleran, *The Law of Chapter 93A § 7:6*, at 201 (1989).

On appeal, Utica takes the position that the judge was wrong to find the Cleggs's demand for \$ 750,000 reasonable because, while this figure may have become reasonable with the passage of time and the collection of further [***16] information, it was not reasonable at the time the demand letter was received and thus Utica's response, or lack thereof, was justified. [*421] We agree with Utica that a duty to settle does not arise until "liability has become reasonably clear," *G. L. c. 176D, § 3 (9) (f)*, and that liability encompasses both fault and damages. See, e.g., *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, *supra* at 677 (no damages awarded because liability was not reasonably clear); *Demeo v. State Farm Mut. Auto. Ins. Co.*, 38 *Mass. App. Ct. 955, 957, 649 N.E.2d 803 (1995)* (defendant's fault liability was not reasonably clear). Insurers must be given the time to investigate claims thoroughly to determine their liability. Our decisions interpreting the obligations contained within *G. L. c. 176D, § 3 (9)*, in no way penalize insurers who delay in good faith when liability is not clear and requires further investigation.

In this case the evidence supported the judge's finding that fault was never at issue and "at no time did Utica consider the case to be anything but a so-called 100% liability case against its insured." As to damages, Utica persistently argues these were a matter of valid dispute, [***17] pointing out that even the Cleggs's brief states that the dollar amount of damages were "undetermined until the agreed upon settlement." While the eventual combined settlement figure paid by both Utica and Merrimack may have been the subject of uncertainty, the judge found that by the time the demand letter was received, Utica "possessed sufficient[] documentation" to put it on notice that an offer of \$ 250,000 would be reasonable. Further investigation only confirmed those reports and the evidence suggests that after June, 1992, when the judge found "Utica knew or should have known that [Clegg] was permanently and totally disabled from work," there was no reasonable doubt that damages exceeded the \$ 250,000 available under the Utica policy.

⁸ Even if the \$ 750,000 [**1141] demand of January, [*422] 1992, was unwarranted at that time, by June, 1992, Utica possessed all but one of the medical reports and examinations it considered vital to the reasonableness of the Cleggs's \$ 750,000 settlement demand. As Utica had amassed enough information to know it was highly probable that it would be liable to the full extent of its policy, the judge was warranted in finding that the structured settlement [***18] offers finally offered in July were "unreasonably low," "unrealistic," and "unjustified." See *DiMarzo v. American Mut. Ins. Co.*, 389 *Mass. 85, 102, 449 N.E.2d 1189 (1983)*, citing *Kohl v. Silver Lake Motors, Inc.*, 369 *Mass. 795, 799, 343 N.E.2d 375 (1976)* (determination of reasonableness is a question of fact).⁹ Far from promoting settlement, Utica's response to the Cleggs's demand letter followed by a continuing unwillingness to extend a reasonable offer of settlement foreseeably [*423] forced the claimants to litigate. See *Calimlim v. Foreign Car Ctr., Inc.*, *supra* at 234.¹⁰

⁸ We recognize Utica's point, on which the dissent also focuses, that it would not have paid its proceeds to the Cleggs "until the entire case was settled with whatever contribution Merrimack would make" as the excess insurer, because Utica's duty to its insureds would not have terminated until the complete settlement was concluded. This fact, however, cannot shield Utica from liability when it was reasonably clear that damages would exceed \$ 250,000.

Until Utica was prepared to address the possibility that the Cleggs were entitled to its policy limits, Merrimack, as the excess insurer, had no reason to know that it would be required to provide compensation from its policy to the Cleggs, and thus no reason to examine or determine the extent of its liability. If we were to follow the position taken by the dissent, when a primary insurer and an excess insurer both cover a claim, a primary insurer who subjects a party to improper delay would never be liable for the injuries caused by such behavior, because there would always be some uncertainty as to what the excess insurer would have done if the primary insurer had behaved differently. We do not believe such a result comports with the language or intent of *G. L. c. 176D, § 3 (9)*, or *G. L. C. 93A*. The evidence regarding the excess insurer's readiness to pay, both as to timing and amount, must necessarily be indirect and inferential in a case such as this, since the excess insurer has no obligation or incentive to make an explicit commitment until the primary insurer has acted. If, as the dissent suggests, such evidence is insufficient, the in-

jured party would never be able to recover damages in respect to the delay in receiving payment from either the excess insurer or the primary insurer. Primary insurers cannot avoid liability for their unfair settlement practices under *G. L. c. 176D, § 3 (9)*, by pointing to the uncertainty surrounding a claim against an excess insurer, when that uncertainty stems from the primary insurer's own behavior and delay. Additionally, we note that Merrimack's prompt decision to settle, once Utica paid its limits, reinforces our determination that the extent of Utica's liability was not a matter of serious doubt. The promptness of Merrimack's settlement also supports the judge's inference that had Utica offered its policy limits earlier, Merrimack would have settled earlier too.

[***19]

9 Utica also takes issue with the judge's finding that its *G. L. c. 93A* response was inadequate because it failed to discuss any possibility of settlement, instead requesting medical information which had been previously supplied. Utica insists this finding is clearly erroneous because its request for these medical records "accurately described the status of the matter shown in [Utica's] records at the time it was made." Whatever the state of Utica's records, the judge's determination that this request was redundant is supported by the record and the judge's ruling as to the inadequacy of Utica's response to the Cleggs's demand letter was not clearly erroneous.

10 In a similar vein, Utica challenges the judge's finding that Utica's home office accepted the recommendation that its New England office authorized a \$ 250,000 settlement in June, 1992. The judge's finding is supported by the record. See *Schwartz v. Rose, 418 Mass. 41, 46, 634 N.E.2d 105 (1994)*.

Last, Utica takes issue with the judge's findings that certain activities not referred to in the Cleggs's demand letter were [***20] independent violations of *G. L. c. 93A*.¹¹ Specifically, Utica asks that we set aside the judge's findings that Utica violated *c. 93A, § 9*, and acted "unfairly and deceptively" when it allowed its investigators to approach the Cleggs after it knew the Cleggs were represented by counsel and when Utica improperly invaded Clegg's privacy by attempting to contact nurses who had treated him. Chapter 93A requires claimants to set out specifically any activities in their demand letter as to which they seek relief. Separate relief on actions not so mentioned is foreclosed as a matter of law. *Bressel v. Jolicoeur, 34 Mass. App. Ct. 205, 211, 609 N.E.2d 94 (1993)*, citing *Entrialgo v. Twin City Dodge, 368 Mass. 812, 813, 333 N.E.2d 202 (1975)*. See *Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 287, 475 N.E.2d 727*

(1985). This preclusion does not mean, however, that the judge was foreclosed from taking such activities into account in reaching his conclusion that the insurer had acted improperly and violated its duty under *c. 176D, § 3 (9)*.¹²

11 Utica also challenges the judge's determination that "had Utica offered its policy limits in late 1992, Merrimack would have made an offer at least equivalent to that which it made in May, 1994 (\$ 425,000), and which [Clegg] accepted." The record supports the judge's inference that Merrimack would have settled once Utica tendered its limits. See note 8, *supra*. As to any uncertainty regarding the amount of an earlier Merrimack settlement, this will need to be resolved when the case is remanded for a recalculation of damages, see *infra*.

[***21]

12 Furthermore, we note that, while two of the investigations had already occurred, the third investigation and the improper attempt to contact Clegg's nurses had not occurred at the time of the demand letter.

[**1142] C

Measure of damages under G. L. c. 93A. Finding a violation of *G. L. c. 93A, § 9 (3)*, the judge awarded the Cleggs damages in the amount of \$ 250,000, the amount of Utica's policy limit which was paid as part of the settlement. This amount was then trebled under the provisions of *G. L. c. 93A, § 9 (3)*, the relevant text of which provides:

[*424] "if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation . . . or that the refusal to grant relief upon demand was made in bad faith *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 [***22] same and underlying transaction or occurrence*"

(emphasis supplied). The italicized portion of this statute was inserted by St. 1989, c. 580, § 1, which was apparently enacted in response to cases such as *Bertassi v. Allstate Ins. Co., 402 Mass. 366, 522 N.E.2d 949 (1988)*;

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Trempe v. Allstate Cas. & Sur. Co., 20 Mass. App. Ct. 448, 480 N.E.2d 670 (1985); and *Wallace v. American Mfrs. Mut. Ins. Co.*, 22 Mass. App. Ct. 938, 494 N.E.2d 35 (1986), which limited those damages subject to multiplication under c. 93A to loss of use damages, measured by the interest lost on the amount the insurer wrongfully failed to provide the claimant. See *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass. App. Ct. 748, 753-754, 673 N.E.2d 84 (1996); *Greelish v. Drew*, 35 Mass. App. Ct. 541, 542 n.3, 622 N.E.2d 1376 (1993). This amendment greatly increased the potential liability of an insurer who willfully, knowingly or in bad faith engages in unfair business practices.

Unlike the case of *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass. App. Ct. at 755-756, Utica paid the Cleggs the amount due under its policy prior to the c. 93A litigation. When a case has been settled [***23] outside the courtroom, there is no "judgment" on which to base the multiple damage calculus. *Bonofiglio v. Commercial Union Ins. Co.*, 411 Mass. 31, 576 N.E.2d 680 (1991), *Commercial Union Ins. Co.*, 412 Mass. 612, 591 N.E.2d 197 (1992). In *Bonofiglio*, a claimant sought insurance proceeds from his insurer following an automobile accident in which the claimant sustained serious personal injuries. After the claimant presented the insurer with a demand letter under c. 93A, the insurer extended an inadequate settlement offer which the claimant refused and the case proceeded to arbitration. In arbitration, the claimant was awarded \$ 283,000. In his subsequent successful lawsuit alleging unfair settlement practices in violation of *G. L. c. 176D, § 3 (9)*, the claimant asked the judge to double the amount of the arbitrator's [*425] award, and not merely the interest lost due to unfair delay on the part of the insurer. 494 N.E.2d at 32-33. Discussing the amount to be doubled, we held that the arbitrator's award was not a "judgment" within the meaning of the amended statute. Noting the canon of construction contained in *G. L. c. 4, § 6*, Third, we determined that "the term 'judgment' has acquired a peculiar meaning in law; it [***24] is founded on a decision by a court, not on an award by an arbitrator." *Id.* at 37, citing *Mass. R. Civ. P. 54 (a)*, 365 Mass. 820 (1974). Just as an arbitrator's award is not a judgment, neither is a settlement. The multiple damages provided under c. 93A are punitive damages intended to penalize insurers who unreasonably and unfairly force claimants into litigation by wrongfully withholding insurance proceeds. As part of a statutory scheme meant to encourage out-of-court resolutions, the statute does not punish settling insurers by placing the entire settlement award at risk of multiplication. Where there has been no judgment, our previous rule remains in effect: base damages are calculated according to the interest lost on the money wrongfully withheld by the insurer, compensating claimants for "the costs and expenses directly resulting from the insurer's conduct." S. Young, Chapter 93A and

the Insurance Industry § 14.19, Chapter 93A Rights and Remedies (Mass. Continuing Legal Educ. 1996 & Supp. 1996). See *Bertassi v. Allstate Ins. Co.*, *supra* at 372-373; *Greelish v. Drew*, *supra* at 545.

[**1143] Because the statutory language the judge used to determine liability and to [***25] award damages does not apply to settlements, there will have to be a determination under the standard set out here of what damages the defendant caused the Cleggs. The judge will need to determine the date at which Utica should have offered its policy limits and the date at which Merrimack would have been willing to settle in order to determine the period of time during which the Cleggs were wrongfully denied the use of funds from the insurers. See note 11, *supra*, as to amount.

III

The plaintiffs raise several claims regarding the circumstances and the intentions of their settlement agreement with the Butlers, including reliance and estoppel, contract theories, and judicial error, to support their contention that a judgment [*426] should have been entered against the Butlers in the amount of \$ 675,000. The fervor with which the Cleggs worked to incorporate this entry of judgment against the Butlers can only be explained by an awareness that *G. L. c. 93A, § 9 (3)*, provides that "judgment on all claims arising out of the same and underlying transaction or occurrence" are subject to multiple damage calculations. Nonetheless, as stated above, "judgment" is a term of art and does not encompass [***26] damages awarded as part of a settlement. *Bonofiglio v. Commercial Union Ins. Co.*, 411 Mass. 31, 37, 576 N.E.2d 680 (1991). Thus, it does not matter what terminology the parties include within a settlement. It will not be a "judgment" for purposes of *G. L. c. 93A, § 9 (3)*. This antecedent motion by the plaintiffs was properly dismissed.

We remand this case to the Superior Court for a re-determination of damages in accordance with this opinion.

So ordered.

DISSENT BY: O'CONNOR

DISSENT

O'CONNOR, J. (dissenting). The complaint in this case contained five counts. The first four counts alleged that James A. Clegg (Clegg) sustained personal injuries and his wife, Katherine M. Clegg, sustained consequential damages as a result of negligence on the part of the defendants Jeff L. Butler, Louis C. Butler, and Helene M. Butler. In the fifth count, Clegg alleged that the defendant Utica Mutual Insurance Company (Utica) en-

gaged in unfair settlement practices in violation of *G. L. c. 176D, § 3 (9) (f)*, and as a result was liable to Clegg under *G. L. c. 93A, § 9 (3)*. Trial was scheduled for June, 1994. At a mediation session on May 4, 1994, Utica, the Butlers' motor vehicle liability insurer, [***27] offered the Cleggs \$ 250,000, the limits of its policy, and Merrimack Mutual Insurance Company (Merrimack), the Butlers' excess carrier, offered \$ 425,000, resulting in settlement of the motor vehicle tort claims against the Butlers asserted in Counts One through Four for \$ 675,000. Subsequently the remaining count, Count Five, against Utica, was tried jury waived and resulted in a judgment in the sum of \$ 750,000 (\$ 250,000 trebled) plus interest in the sum of \$ 59,685 plus attorney's fees of \$ 150,000 for a total of \$ 959,685. The judgment, of course, was in addition to the \$ 675,000 settlement of [*427] the tort claims against the Butlers asserted in Counts One through Four.

Utica appeals from the judgment against it in connection with the issues raised by Count Five and the plaintiffs appeal from the denial of their motion for the entry of judgment with respect to the first four counts. I concur with the court's holding that the plaintiffs' motion for entry of judgment on their motor vehicle tort claims was properly denied. I do not agree, however, that this case should be remanded to the Superior Court for a "redetermination of damages" in the dispute between Clegg and Utica (Count [***28] Five). *Ante at* . In my view, after a full and fair opportunity, Clegg has failed to establish Utica's liability because he has failed to prove any injury or adverse impact on his rights as a result of anything Utica did or failed to do. The court should order the entry of judgment for Utica.

Massachusetts law permits a third-party claimant, as is Clegg with reference to Utica, to sue the insurer of another party when the claimant alleges, as does Clegg here, that he or she has been injured or his or her rights have been adversely affected by the insurer's [**1144] violation of *G. L. c. 93A*, which incorporates the provisions of *G. L. c. 176D, § 3 (9)*. *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 675, 448 N.E.2d 357 (1983). The success of such a claim, of course, is contingent on the claimant's proof of injury or an adverse effect on his or her rights resulting from the insurer's conduct, a burden which Clegg has not sustained.

General Laws c. 176D, § 3 (9) (f), on which Clegg relies, provides in relevant part, "The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance: . . . [***29] . Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions: . . . (f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."

Surely, regardless of when Utica should have offered its \$ 250,000 limits, no payment would have been made, and none was due, without the tort claims against the Butlers having been settled and the Butlers released. When, if at all, prior to May 4, 1994, the date the tort claims were settled for \$ 675,000, would that have happened? Neither the judge's findings nor the evidence suggests the answer. Clegg's burden was not only to [*428] prove that Utica should have offered its policy limit sooner than May 4, 1994, but also, at a minimum, that, if Utica had done so, Merrimack too would have made an offer at an appreciable time before May 4 that the plaintiffs would have accepted. Without such proof, no injury or adverse impact on the plaintiffs in the form of loss of use of money for a period of time or otherwise has been proved.

The judge below issued a memorandum of findings of fact and conclusions of law. One of those "findings" and [***30] one of those "conclusions of law" are especially important. Finding no. 61 states, "The evidence permits the inference, which I draw, and the finding, which I make, that had Utica offered its policy limits, in late 1992, Merrimack would have made an offer at least equivalent to that which it made in May, 1994 (\$ 425,000), and which [Clegg] accepted." Notably absent is a finding as to when, or approximately when, or by when, Merrimack would have made, and the tort plaintiffs would have accepted, such an offer. The judge states in conclusion of law no. 15 in relevant part as follows: "It is likely that had Utica tendered the policy limits earlier, the excess carrier would have settled sooner. However, I cannot determine fairly when such settlement would have occurred." The court errs when it states, *ante at* n.11, in reference to finding no. 61 quoted above, that "the record supports the judge's determination that Merrimack would have settled once Utica tendered its limits." The judge made no such determination. Perhaps, standing alone, finding no. 61 could fairly be construed as a determination that Merrimack would have offered at least \$ 425,000 whenever Utica offered [***31] the limits of its policy, but the judge's conclusion of law no. 15 clearly states that the judge was unable fairly to determine when a settlement would have occurred following a \$ 250,000 offer by Utica. The judge was not persuaded, and therefore did not make a determination, as to when or in what circumstances Merrimack would have made an offer, acceptable to the tort plaintiffs, that would have settled their claims and produced the appropriate releases. Indeed, my review of the record satisfies me that the evidence as a matter of law would not have warranted such a finding.

Settlement of the tort claims required the agreement of the plaintiffs and both insurers, Utica and Merrimack. The judge was not persuaded as to when that would have

424 Mass. 413, *; 676 N.E.2d 1134, **;
1997 Mass. LEXIS 64, ***

occurred if [*429] Utica had offered its policy limits in 1992 or at any time before May 4, 1994. As a matter of law, the evidence would not have warranted such a finding. For all that appears, regardless of when, before May 4, 1994, Utica might or should have offered \$ 250,000, the case would not have settled until it did settle as a result of the court-sponsored mediation that produced the settlement that was reached with the prospect of a prompt trial [***32] if mediation were to fail. Therefore, it cannot fairly be said that Utica failed "to effectuate prompt, fair and equitable settlement[]" of the plaintiffs' tort claims in violation of *G. L. c. 176D, § 3 (9) (f)*, and that liability under *G. L. c. 93A, § 9 (3)*, has been established. Utica was not shown to have been in position to effectuate a prompt, [**1145] fair and equitable settlement before May 4, 1994. Clegg failed to persuade the

judge -- indeed to offer evidence -- that he has been deprived of the use of an established amount of money for an established length of time. He has not proved that he has been injured or that his rights have been adversely affected by any action or inaction of Utica, see *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 675, 678, 448 N.E.2d 357 (1983), as required for liability, and therefore for recovery of damages, under Count Five of the complaint. Clegg has had his day in court. There is no need, therefore, and it is inappropriate, to "remand this case to the Superior Court for a redetermination of damages." *Ante* at . See *Whalen v. NYNEX Info. Resources Co.*, 419 Mass. 792, 796-797, 647 N.E.2d 716 (1995). I would [***33] order the entry of judgment for Utica.

NO. 9



DEANA COLEMAN, Plaintiff, v. AMERICAN COMMERCE INSURANCE COMPANY, a foreign insurance company, Defendant.

Case No. 09-5721RJB

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2010 U.S. Dist. LEXIS 97757

September 17, 2010, Decided
September 17, 2010, Filed

SUBSEQUENT HISTORY: Affirmed by *Coleman v. Am. Commerce Ins.*, 2011 U.S. App. LEXIS 24683 (9th Cir. Wash., Dec. 13, 2011)

PRIOR HISTORY: *Coleman v. Am. Commerce Ins. Co.*, 2010 U.S. Dist. LEXIS 95654 (W.D. Wash., Sept. 14, 2010)

COUNSEL: [*1] For Deana Coleman, Plaintiff, Counter Defendant: Breckan C.L. Scott, Kenneth Gorton, Ron Meyers, LEAD ATTORNEYS, RON MEYERS & ASSOCIATES, LACEY, WA.

For American Commerce Insurance, a foreign corporation doing business in Washington, Defendant, Counter Claimant: Rory W Leid, III, LEAD ATTORNEY, Jennifer P Dinning, COLE LETHER WATHEN LEID & HALL, P.C., SEATTLE, WA; Sally Kim, LEAD ATTORNEY, COLE LETHER WATHEN & LEID, SEATTLE, WA.

JUDGES: Robert J. Bryan, United States District Judge.

OPINION BY: Robert J. Bryan

OPINION

ORDER GRANTING AMERICAN COMMERCE'S MOTION FOR SUMMARY JUDGMENT RE DAMAGES

This matter comes before the Court Defendant American Commerce's above captioned motion (Dkt. 111). The Court has considered the motion, responses, and the remainder of the file herein.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from a motor vehicle accident that occurred on September 9, 2006, at which Plaintiff Coleman's daughter, Kayla Peck, was seriously injured. Dkt. 38, p. 1. Plaintiff alleges that she suffered emotional distress from witnessing her daughter's injuries which manifested itself in long-term physical symptoms and lead to a diagnosis of Post Traumatic Stress Disorder ("PTSD"). *Id.* At the time [*2] of the accident, Ms. Coleman had an Underinsured Motorist ("UIM") Policy with Defendant American Commerce Insurance with whom she filed a claim. *Id.*

On November 13, 2009, Plaintiff Coleman filed a complaint in Thurston County Superior Court alleging that, among other things, Defendant American Commerce violated its duty of good faith and fair dealings, violated the Washington State Insurance Fair Conduct Act, *RCW 48.30.015* ("IFCA"), and violated the Washington State Consumer Protection Act, Chapter 19.86 *RCW* ("CPA"). Dkt. 1-2, p. 20-22.

On August 3, 2010, Defendant American Commerce filed a motion for summary judgment regarding the issue of damages. Dkt. 111. Defendant American Commerce is requesting that the Court dismiss Plaintiff Coleman's claims for common law bad faith, and violations of the IFCA and CPA. Dkt. 111. Defendant essentially argues that the Plaintiff has not shown any damages or harms which would allow for a cause of action under bad faith, IFCA, or CPA. Dkt. 111. Plaintiff responds by essentially arguing that the Defendant's acts have exacerbated Ms. Coleman's Post-Traumatic Stress Disorder ("PTSD")

symptoms, caused Plaintiff to incur costs due to Defendant's ongoing [*3] acts, and caused Plaintiff to incur costs due to the prosecution of her claims. Dkt. 123.

II. DISCUSSION

"The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980). Where the state's highest appellate court has not spoken on an issue, the federal court's role is to predict what decision the state's highest court would reach. *See Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915, 921 (9th Cir. 2009). A federal court uses "intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance" to predict how the state's highest court would rule. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olypmia*, 379 F.3d 557, 560 (9th Cir. 2004). A federal court will follow the decisions of state intermediate appellate courts unless there is "convincing evidence" that the state's highest court would decide the issue differently. *Id.*

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any [*4] affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed.R.Civ.P.* 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also Fed.R.Civ.P.* 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence [*5] of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial --e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elec. Service Inc.*, 809 F.2d at 630. The court must

resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T. W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

A. Bad Faith Claim

"An action for bad faith handling of an insurance claim sounds in tort." *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664, 668 (Wash. 2008)(citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1999)). The duty of good faith is applicable to both first-party [*6] and third-party coverage. *St. Paul Fire*, 196 P.3d at 668. A first-party insured has a cause of action for bad faith investigation even where there is ultimately no coverage. *Id.* Bad-faith can be asserted where the insurer mishandled the claim by failing to conduct a reasonable investigation. *Id.* An insurer's denial of coverage, without reasonable justification, constitutes bad faith. *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520, 526 (Wash. 1990). Claims of insurer bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty. *St. Paul Fire*, 196 P.3d at 668 (citing *Mut. of Enumclaw Ins. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007))(internal quotations omitted). In order to establish bad faith, an insured is required to show the breach was unreasonable, frivolous, or unfounded. *Id.* Whether an insurer acted in bad faith is a question of fact. *Id.* (citing *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003)).

In a first-party context, there is no rebuttable presumption of harm. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933, 938 (Wash. 1998). The insured must prove actual harm, and [*7] its damages are limited to the amounts it incurred as a result of the bad faith, as well as general tort damages. *See Id.* at 940; *St. Paul Fire*, 196 P.3d at 669. The insured is "liable for the consequential damages to the insured as a result of the insurer's breach of its contractual and statutory obligations." *Coventry*, 961 P.2d at 939.

Defendant American Commerce asserts that Plaintiff Coleman does not have a claim for bad faith since she cannot show any damages. Dkt. 111, p. 5-9. Plaintiff responds by asserting that the Plaintiff suffered harm when the Defendant violated numerous provisions of

Washington law, and exacerbated Plaintiff's continuing diagnosis of PTSD. Dkt. 123, p. 6.

In this case, the Plaintiff has failed to show damages or harm incurred as a result of the bad faith by the Defendant. While Plaintiff alleges that her PTSD was exacerbated by the acts of bad faith by the Defendant, the Plaintiff has not produced specific evidence to support her assertion. The lack of evidence does not allow the Plaintiff to prevail in a summary judgment motion. Additionally, the Plaintiff has not cited and the Court has not found law that supports her assertion that violations of Washington [*8] law may be viewed as damages in a bad faith context. For the foregoing reasons, Defendant's motion for summary judgment as to Plaintiff's bad faith claim should be granted.

B. Insurance Fair Conduct Act ("IFCA")

RCW 48.30.015. Unreasonable denial of a claim for coverage or payment of benefits. (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in *subsection (3)* of this section.

Defendant American Commerce argues that Plaintiff Coleman does not have a claim under the IFCA because there were no actual damages. Dkt. 111, p. 6, 9. Plaintiff responds by arguing that the IFCA includes all damages incurred by the Plaintiff, including the cost of litigation. Dkt. 123, p. 7.

As noted above, the Plaintiff has not shown actual damages that were the result of the Defendant's acts. Plaintiff has also not cited and the Court has not found law which supports the Plaintiff's assertion that the cost of litigation [*9] alone is an actual damage which will give rise to a cause of action under the IFCA. For the foregoing reasons, the Defendant's motion for summary judgment as to Plaintiff's IFCA claims should be granted.

C. Washington Consumer Protection Act ("CPA") Chapter 19.86 RCW

RCW 19.86.090 allows anyone who has been "injured in his or her business or property by a violation" of the CPA to bring a civil action in which he or she may recover actual damages, trial costs, and attorney fees.

Ambach v. French, 167 Wn.2d 167, 216 P.3d 405, 407 (Wash. 2009). To state a prima facie claim under the CPA, a plaintiff must "establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Id.* (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (Wash. 1986)).

While the injury involved need not be great, or even quantifiable, it must be an injury to business or property. *Ambach*, 216 P.3d at 407. Personal injury damages are not compensable damages under the CPA and do not constitute injury to business or property. *Id.* at 408. Where plaintiffs are [*10] both physically and economically injured by one act, courts generally refuse to find injury to business or property as used in the consumer protection laws. *Id.* at 409. Damages for mental pain and suffering and its objective physical manifestations are not compensable under the CPA. *Washington State Physicians Ins. Exchange & Assoc. v. Fison*, 122 Wn.2d 299, 858 P.2d 1054, 1064 (Wash. 1993). The cost of having to prosecute a CPA claim is not sufficient to show injury to business or property. *See Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885, 901 (2009) ("mere involvement in having to... prosecute a CPA counterclaim is insufficient to show injury to her business or property."); *Ledcor Industries, Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 206 P.3d 1255, 1262 (Wash. 2009) ("Ledcor argues it was injured because its ongoing involvement in 'the case' required it to pay expert witness fees and other expenses. But these claimed expenses were incurred in the instant lawsuit against MOE, not the underlying litigation. Those expenses are not cognizable injuries under the CPA."); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 825 P.2d 714, 721 (Wash. Ct. App. 1992) ("Attorney fees... do not qualify as [*11] actual damages.")

Defendant American Commerce contends that Plaintiff Coleman has not shown actual injury to business or property. Dkt. 111, p. 7, 9. Plaintiff responds by arguing that the "ongoing CPA violations of the Defendant have forced the Plaintiff to incur [a] myriad [of] CPA injuries, including expenditures to secure the benefit of the insurance policy, and to secure her own expert evidence that would have been unnecessary had the Defendant conducted an adequate investigation." Dkt. 123, p. 8-9. Plaintiff also asserts expenses related to her litigation. Dkt. 123, p. 9.

Plaintiff has not shown that she has any actual injury to her business or property, and her alleged injuries do not give rise to a cause of action under the CPA. Plaintiff's vague reference to a myriad of CPA injuries is not

enough for her to prevail on a summary judgment motion. Moreover, her expenses for PTSD and her expenses related to the bringing of the suit are not recognized harms under the CPA and do not give her a cause of action under the CPA. For the foregoing reasons, the Defendant's motion for summary judgment as to the Plaintiff's claims under the CPA should be granted.

III. ORDER

The Court does hereby [*12] find and ORDER:

(1) Defendant's Motion for Summary Judgment Re Damages (Dkt. 111) is **GRANTED**. Plaintiff's claims are **DISMISSED**, and all issues in the case hav-

ing been resolved, this case is **DISMISSED**.

(2) The Clerk is directed to send copies of this Order all counsel of record and any party appearing *pro se* at said party's last known address.

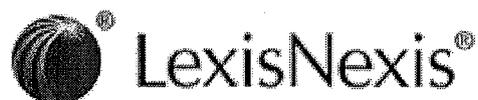
DATED this 17th day of September, 2010.

/s/ Robert J. Bryan

Robert J. Bryan

United States District Judge

NO. 10



FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS v. STAN-
MORE CAWTHON COOPER

No. 10-1024

SUPREME COURT OF THE UNITED STATES

132 S. Ct. 1441; 182 L. Ed. 2d 497; 2012 U.S. LEXIS 2539; 80 U.S.L.W. 4289; 23 Fla.
L. Weekly Fed. S 222

November 30, 2011, Argued
March 28, 2012, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: On remand at, Decision reached on appeal by *Cooper v. FAA*, 2012 U.S. App. LEXIS 20709 (9th Cir., Oct. 4, 2012)

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Cooper v. FAA, 622 F.3d 1016, 2010 U.S. App. LEXIS 19622 (9th Cir. Cal., 2010)

DISPOSITION: 622 F.3d 1016, reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent pilot sued petitioners, the Federal Aviation Administration ("FAA"), the U.S. Department of Transportation ("DOT"), and the Social Security Administration ("SSA"), claiming that they violated his rights under the Privacy Act, 5 U.S.C.S. § 552a. The U.S. District Court for the Northern District of California dismissed the action, but the U.S. Court of Appeals for the Ninth Circuit reversed. The U.S. Supreme Court granted certiorari.

OVERVIEW: A pilot who contracted the human immunodeficiency virus ("HIV") in 1985 and applied for FAA medical certificates in 1994, 1998, 2000, 2002, and 2004 without disclosing his HIV status or his medications was

charged with making false statements to a U.S. Government agency, in violation of 18 U.S.C.S. § 1001, after the SSA disclosed his HIV status to the DOT. After he pled guilty to the charges and was sentenced to two years' probation and fined \$1,000, he sued the FAA, the DOT, and the SSA, claiming that the SSA's unlawful disclosure of his confidential medical information caused him mental and emotional distress. The Supreme Court found that the pilot was not allowed under 5 U.S.C.S. § 552a to recover damages for mental and emotional distress. Congress limited the type of money damages that could be recovered to "actual damages" in § 552a(g)(4)(A), and that term did not unequivocally authorize an award of damages for mental or emotional distress and did not waive the Government's sovereign immunity from liability for such harm.

OUTCOME: The Supreme Court reversed the Ninth Circuit's judgment and remanded the case. 5-3 Decision; 1 dissent.

SYLLABUS

[*1443] [**504] Respondent Cooper, a licensed pilot, failed to disclose his human immunodeficiency [*1444] virus (HIV) diagnosis to the Federal Aviation Administration (FAA) at a time when the agency did not issue medical certificates, which are required to operate an aircraft, to persons with HIV. Subsequently, respondent applied to the Social Security Administration (SSA) and received long-term disability benefits on the basis of his HIV status. Thereafter, he renewed his certificate with the FAA on several occasions, each time intentionally withholding information about his condition. The Department of Transportation (DOT), the FAA's parent

agency, launched a joint criminal investigation with the SSA to identify medically unfit individuals who had obtained FAA certifications. The DOT provided the SSA with the names of licensed pilots, and the SSA, in turn, provided the DOT with a spreadsheet containing information on those pilots who had also received disability benefits. Respondent's name appeared on the spreadsheet, and an investigation led to his admission that he had intentionally [***2] withheld information about his HIV status from the FAA. His pilot certificate was revoked, and he was indicted for making false statements to a Government agency. He pleaded guilty and was fined and sentenced to probation. He then filed suit, alleging that the FAA, DOT, and SSA violated the Privacy Act of 1974, which contains a detailed set of requirements for the management of records held by Executive Branch agencies. The Act allows an aggrieved individual to sue for "actual damages," 5 U.S.C. §552a(g)(4)(A), if the Government intentionally or willfully violates the Act's requirements in such a way as to adversely affect the individual. Specifically, respondent claimed that the unlawful disclosure to the DOT of his confidential medical information had caused him mental and emotional distress. The District Court concluded that the Government had violated the Act. But, finding the term "actual damages" ambiguous, the court relied on the sovereign immunity canon, which provides that sovereign immunity waivers must be strictly construed in the Government's favor, to hold that the Act does not authorize the recovery of nonpecuniary damages. Reversing the District Court, the Ninth Circuit [***3] concluded that "actual damages" in the Act is not ambiguous and includes damages for mental and emotional distress.

Held: The Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the Government's sovereign immunity from liability for such harms. Pp. 4-19.

[**505] (a) A waiver of sovereign immunity must be unequivocally expressed in statutory text, see *e.g.*, *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486, and any ambiguities are to be construed in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608. Ambiguity exists if there is a plausible interpretation of the statute that would not allow money damages against the Government. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181. Pp. 5-6.

(b) The term "actual damages" in the Privacy Act is a legal term of art, and Congress, when it employs a term of art, "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken," *Molzof v. United States*, 502 U.S. 301, 307, 112 S. Ct. 711, 116 L. Ed. 2d 731. Even as a legal term, the precise meaning of

"actual damages" is [*1445] far from clear. Although the term is sometimes understood to include nonpecuniary [***4] harm, it has also been used or construed more narrowly to cover damages for only pecuniary harm. Because of the term's chameleon-like quality, it must be considered in the particular context in which it appears. Pp. 6-9.

(c) The Privacy Act serves interests similar to those protected by defamation and privacy torts. Its remedial provision, under which plaintiffs can recover a minimum award of \$1,000 if they first prove at least some "actual damages," "parallels" the common-law torts of libel *per quod* and slander, under which plaintiffs can recover "general damages" if they first prove "special damages." *Doe v. Chao*, 540 U.S. 614, 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. "Special damages" are limited to actual pecuniary loss, which must be specially pleaded and proved. "General damages" cover nonpecuniary loss and need not be pleaded or proved. This parallel suggests the possibility that Congress intended the term "actual damages" to mean "special damages," thus barring Privacy Act victims from any recovery unless they can first show some actual pecuniary harm. That Congress would choose "actual damages" instead of "special damages" is not without precedent, as the terms have occasionally been used interchangeably. Furthermore, [***5] any doubt about the plausibility of construing "actual damages" as special damages in the Privacy Act is put to rest by Congress' deliberate refusal to allow recovery for "general damages." In common-law defamation and privacy cases, special damages is the only category of compensatory damages other than general damages. Because Congress declined to authorize general damages, it is reasonable to infer that Congress intended the term "actual damages" in the Act to mean special damages for proven pecuniary loss. Pp. 9-14.

(d) Although the contrary reading of the Privacy Act accepted by the Ninth Circuit and advanced by respondent is not inconceivable, it is plausible to read the Act as authorizing only damages for economic loss. Because Congress did not speak unequivocally, the Court adopts an interpretation of "actual damages" limited to proven pecuniary harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires. P. 14.

[**506] (e) Respondent raises several counterarguments: (1) common-law cases often define "actual damages" to mean all compensatory damages; (2) the elimination of "general damages" from the Privacy Act means [***6] that there can be no recovery for *presumed* damages, but plaintiffs can still recover for *proven* mental and emotional distress; (3) because some courts have construed "actual damages" in similar statutes to include mental and emotional distress, Congress must

have intended "actual damages" in the Act to include mental and emotional distress as well; and (4) precluding nonpecuniary damages would lead to absurd results, thereby frustrating the Act's remedial purpose. None of these arguments overcomes the sovereign immunity canon. Pp. 14-19.

622 F.3d 1016, reversed and remanded.

COUNSEL: Eric J. Feigin argued the cause for petitioners.

Raymond A. Cardozo argued the cause for respondent.

JUDGES: ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined. KAGAN, J., took no part in the consideration or decision of the case.

OPINION BY: ALITO

OPINION

[*1446] JUSTICE ALITO delivered the opinion of the Court.

The Privacy Act of 1974, codified in part at 5 U.S.C. §552a, contains a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies. If an agency fails to comply with those requirements "in such a way as to have an adverse effect [***7] on an individual," the Act authorizes the individual to bring a civil action against the agency. §552a(g)(1)(D). For violations found to be "intentional or willful," the United States is liable for "actual damages." §552a(g)(4)(A). In this case, we must decide whether the term "actual damages," as used in the Privacy Act, includes damages for mental or emotional distress. We hold that it does not.

I

The Federal Aviation Administration (FAA) requires pilots to obtain a pilot certificate and medical certificate as a precondition for operating an aircraft. 14 CFR §§61.3(a), (c) (2011). Pilots must periodically renew their medical certificates to ensure compliance with FAA medical standards. See § 61.23(d). When applying for renewal, pilots must disclose any illnesses, disabilities, or surgeries they have had, and they must identify any medications they are taking. See 14 CFR pt. 67.

Respondent Stanmore Cooper has been a private pilot since 1964. In 1985, he was diagnosed with a human immunodeficiency virus (HIV) infection and began taking antiretroviral medication. At that time, the FAA did

not issue medical certificates to persons with respondent's condition. Knowing that he would not qualify [***8] for renewal of his medical certificate, respondent initially grounded himself and chose not to apply. In 1994, however, he applied for and received a medical certificate, but he did so without disclosing his HIV status or his medication. He renewed his certificate in 1998, 2000, 2002, and 2004, each time intentionally withholding information about his condition.

[**507] When respondent's health deteriorated in 1995, he applied for long-term disability benefits under Title II of the Social Security Act, 42 U.S.C. §401 et seq. To substantiate his claim, he disclosed his HIV status to the Social Security Administration (SSA), which awarded him benefits for the year from August 1995 to August 1996.

In 2002, the Department of Transportation (DOT), the FAA's parent agency, launched a joint criminal investigation with the SSA, known as "Operation Safe Pilot," to identify medically unfit individuals who had obtained FAA certifications to fly. The DOT gave the SSA a list of names and other identifying information of 45,000 licensed pilots in northern California. The SSA then compared the list with its own [*1447] records of benefit recipients and compiled a spreadsheet, which it gave to the DOT.

The spreadsheet [***9] revealed that respondent had a current medical certificate but had also received disability benefits. After reviewing respondent's FAA medical file and his SSA disability file, FAA flight surgeons determined in 2005 that the FAA would not have issued a medical certificate to respondent had it known his true medical condition.

When investigators confronted respondent with what had been discovered, he admitted that he had intentionally withheld from the FAA information about his HIV status and other relevant medical information. Because of these fraudulent omissions, the FAA revoked respondent's pilot certificate, and he was indicted on three counts of making false statements to a Government agency, in violation of 18 U.S.C. §1001. Respondent ultimately pleaded guilty to one count of making and delivering a false official writing, in violation of §1018. He was sentenced to two years of probation and fined \$1,000.¹

¹ Respondent eventually applied for recertification as a pilot. After reviewing respondent's medical records, including information about his HIV diagnosis and treatment, the FAA reissued his pilot certificate and medical certificate. Brief for Respondent 5, n. 1.

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Claiming [***10] that the FAA, DOT, and SSA (hereinafter Government) violated the Privacy Act by sharing his records with one another, respondent filed suit in the United States District Court for the Northern District of California. He alleged that the unlawful disclosure to the DOT of his confidential medical information, including his HIV status, had caused him "humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress." App. to Pet. for Cert. 120a. Notably, he did not allege any pecuniary or economic loss.

The District Court granted summary judgment against respondent. *816 F. Supp. 2d 778, 781 (2008)*. The court concluded that the Government had violated the Privacy Act and that there was a triable issue of fact as to whether the violation was intentional or willful.² But the court held that respondent could not recover damages [**508] because he alleged only mental and emotional harm, not economic loss. Finding that the term "actual damages" is "facially ambiguous," *id.*, at 791, and relying on the sovereign immunity canon, which provides that waivers of sovereign immunity must be strictly construed in favor of the Government, the court concluded that the [***11] Act does not authorize the recovery of damages from the Government for nonpecuniary mental or emotional harm.

2 With certain exceptions, it is unlawful for an agency to disclose a record to another agency without the written consent of the person to whom the record pertains. *5 U.S.C. §552a(b)*. One exception to this nondisclosure requirement applies when the head of an agency makes a written request for law enforcement purposes to the agency that maintains the record. See *§552a(b)(7)*. The agencies in this case could easily have shared respondent's medical records pursuant to the procedures prescribed by the Privacy Act, but the District Court concluded that they failed to do so.

The United States Court of Appeals for the Ninth Circuit reversed and remanded. *622 F.3d 1016, 1024 (2010)*. The court acknowledged that the term "actual damages" is a "chameleon" in that "its meaning changes with the specific statute in which it is found." *Id.*, at 1029. But the court nevertheless held that, as used in the Privacy Act, the term includes damages for mental and emotional distress. Looking to what it described as "[i]ntrinsic" and "[e]xtrinsic" sources, *id.*, at 1028, 1031, the [*1448] court concluded [***12] that the meaning of "actual damages" in the Privacy Act is not ambiguous and that "a construction that limits recovery to pecuniary loss" is not "plausible," *id.*, at 1034.

The Government petitioned for rehearing or rehearing en banc, but a divided court denied the petition. *Id.*, at 1019. The Government then petitioned for certiorari, and we granted review. *564 U.S. ___*, *131 S. Ct. 3025*, *180 L. Ed. 2d 843 (2011)*.

II

Because respondent seeks to recover monetary compensation from the Government for mental and emotional harm, we must decide whether the civil remedies provision of the Privacy Act waives the Government's sovereign immunity with respect to such a recovery.

A

We have said on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. See, e.g., *Lane v. Pena*, *518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996)*; *United States v. Nordic Village, Inc.*, *503 U.S. 30, 33, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992)*; *Irwin v. Department of Veterans Affairs*, *498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)*. Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. *Lane, supra*, at 192, *116 S. Ct. 2092, 135 L. Ed. 2d 486*. Any ambiguities in the statutory language are to be construed in favor of immunity, *United States v. Williams*, *514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995)*, [***13] so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, *Ruckelshaus v. Sierra Club*, *463 U.S. 680, 685-686, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983)* (citing *Eastern Transp. Co. v. United States*, *272 U.S. 675, 686, 47 S. Ct. 289, 71 L. Ed. 472 (1927)*). Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government. *Nordic Village, supra*, at 34, 37, *112 S. Ct. 1011, 117 L. Ed. 2d 181*.

The question that confronts us here is not whether Congress has consented to be sued for damages under the Privacy Act. That much is clear from the statute, which expressly authorizes recovery from the Government for "actual damages." Rather, the question at issue concerns the scope of that waiver. For the same reason that we refuse to enforce a [**509] waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign. *Lane, supra*, at 192, *116 S. Ct. 2092, 135 L. Ed. 2d 486*.

Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have [***14] observed that the sovereign immunity

canon "is a tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (2008). What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.

B

The civil remedies provision of the Privacy Act provides that, for any "intentional or willful" refusal or failure to comply with the Act, the United States shall [*1449] be liable for "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000." 5 U.S.C. §552a(g)(4)(A). Because Congress did not define "actual damages," respondent urges us to rely on the ordinary meaning of the word "actual" as it is defined in standard general-purpose dictionaries. But as the Court of Appeals explained, "actual damages" is a legal term of art, 622 F. 3d, at 1028, and it is a "cardinal rule of statutory construction" that, when Congress [***15] employs a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken," *Molzof v. United States*, 502 U.S. 301, 307, 112 S. Ct. 711, 116 L. Ed. 2d 731 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 96 L. Ed. 288 (1952)).

Even as a legal term, however, the meaning of "actual damages" is far from clear. The latest edition of Black's Law Dictionary available when Congress enacted the Privacy Act defined "actual damages" as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages." Black's Law Dictionary 467 (rev. 4th ed. 1968). But this general (and notably circular) definition is of little value here because, as the Court of Appeals accurately observed, the precise meaning of the term "changes with the specific statute in which it is found." 622 F. 3d, at 1029.

The term is sometimes understood to include nonpecuniary harm. Take, for instance, some courts' interpretations of the Fair Housing Act (FHA), 42 U.S.C. §3613(c), and the Fair Credit Reporting [***16] Act (FCRA), 15 U.S.C. §§1681n, 1681o. A number of courts have construed "actual" damages in the remedial provisions of both statutes to include compensation for mental and emotional distress. See, e.g., *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636-638 (CA7 1974) (authorizing

compensatory damages under the FHA, 42 U.S.C. §3612, the predecessor to §3613, for humiliation); [**510] *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (CA10 1973) (stating that damages under the FHA "are not limited to out-of-pocket losses but may include an award for emotional distress and humiliation"); *Thompson v. San Antonio Retail Merchants Assn.*, 682 F.2d 509, 513-514 (CA5 1982) (*per curiam*) (explaining that, "[e]ven when there are no out-of-pocket expenses, humiliation and mental distress do constitute recoverable elements of damage" under the FCRA); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834-835 (CA8 1976) (approving an award of damages under the FCRA for "loss of sleep, nervousness, frustration and mental anguish").

In other contexts, however, the term has been used or construed more narrowly to authorize damages for only pecuniary harm. In the wrongful-death provision of the Federal Tort Claims [***17] Act (FTCA), for example, Congress authorized "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." 28 U.S.C. §2674, P2. At least one court has defined "actual damages" in the Copyright Act of 1909, 17 U.S.C. §101(b) (1970 ed.), as "the extent to which the market value of a copyrighted work has been injured or destroyed by an infringement." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (CA9 1985); see also *Mackie v. Rieser*, 296 F.3d 909, 917 (CA9 2002) (holding that "'hurt feelings' over the nature of the infringement" have no place in the actual damages calculus). And some courts have construed "actual damages" in the Securities Exchange Act of 1934, 15 U.S.C. §78bb(a), [*1450] to mean "some form of economic loss." *Ryan v. Foster & Marshall, Inc.*, 556 F.2d 460, 464 (CA9 1977); see also *Osofsky v. Zipf*, 645 F.2d 107, 111 (CA2 1981) (stating that the purpose of §78bb(a) "is to compensate civil plaintiffs for economic loss suffered as a result of wrongs committed in violation of the 1934 Act"); *Herpich v. Wallace*, 430 F.2d 792, 810 (CA5 1970) (noting that the "gist" of an action for damages under the Act is "economic injury"). [***18]³

3 This narrow usage is reflected in contemporaneous state-court decisions as well. See, e.g., *Reist v. Manwiller*, 231 Pa. Super. 444, 449, n. 4, 332 A.2d 518, 520, n. 4 (1974) (explaining that recovery for intentional infliction of emotional distress is allowed "despite the total absence of physical injury and actual damages"); *Nalder v. Crest Corp.*, 93 Idaho 744, 749, 472 P.2d 310, 315 (1970) (noting that damages for "mental anguish" due to the wrongful execution of a judgment "are allowable only as an element of punitive but not of actual damages"). It is also reflected in post-Privacy Act statutes and judicial decisions. See, e.g., 17 U.S.C. §1009(d)(1)(A)(ii)

(defining "actual damages" in the Audio Home Recording Act of 1992 as "the royalty payments that should have been paid"); 18 U.S.C. §2318(f)(3) (2006 ed., Supp. IV) (calculating "actual damages" for purposes of a counterfeit labeling statute in terms of financial loss); *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948, 953 (CA8 1976) (stating that compensatory damages in a civil rights suit "can be awarded for emotional and mental distress even though no actual damages are proven").

Because the term "actual damages" [***19] has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.⁴

4 The dissent criticizes us for noting that the dictionary definition contains an element of circularity. The dissent says that the definition -- "[a]ctual damages' compensate for actual injury" -- is "plain enough." *Post*, at 3 (opinion of SOTOMAYOR, J.). But defining "actual" damages by reference to "actual" injury is hardly helpful when our task is to determine what Congress meant by "actual." The dissent's reference to the current version of Black's Law Dictionary, which provides that "actual damages" can mean "tangible damages," only highlights the term's ambiguity. See Black's Law Dictionary 445 (9th ed. 2009). If "actual damages" can mean "tangible damages," then it can be construed not to include intangible harm, like mental and emotional distress. Similarly unhelpful is the dissent's citation to a general-purpose dictionary that defines "actual" as "existing *in fact* or reality" and "damages" as "compensation or satisfaction *imposed by law* for a wrong or injury." Webster's Third New International Dictionary 22, 571 (2002) (emphasis [***20] added). Combining these two lay definitions says nothing about whether compensation for mental and emotional distress is *in fact imposed by law*. The definitions merely beg the question we are trying to answer. It comes as little surprise, therefore, that "actual damages" has taken on different meanings in different statutes, as our examples amply illustrate.

[**511] C

The Privacy Act directs agencies to establish safeguards to protect individuals against the disclosure of confidential records "which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained." 5 U.S.C. §552a(e)(10); see also §2(b), 88 Stat. 1896 (stating that the "purpose of this Act is to provide certain

safeguards for an individual against an invasion of personal privacy"). Because the Act serves interests similar to those protected by defamation and privacy torts, there is good reason to infer that Congress relied upon those torts in drafting the Act.

In *Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004), we held that the Privacy Act's remedial provision authorizes plaintiffs to recover a guaranteed minimum award of \$1,000 for violations of the Act, but only if they prove [***21] [*1451] at least some "actual damages." *Id.*, at 620, 627, 124 S. Ct. 1204, 157 L. Ed. 2d 1122; see §552a(g)(4)(A). Although we did not address the meaning of "actual damages," *id.*, at 622, n. 5, 627, n. 12, 124 S. Ct. 1204, 157 L. Ed. 2d 1122, we observed that the provision "parallels" the remedial scheme for the common-law torts of libel *per quod* and slander, under which plaintiffs can recover "general damages," but only if they prove "special harm" (also known as "special damages"), *id.*, at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122; see also 3 Restatement of Torts §575, Comments *a* and *b* (1938) (hereinafter Restatement); D. Dobbs, Law of Remedies §7.2, pp. 511-513 (1973) (hereinafter Dobbs).⁵ "Special damages" are limited to actual pecuniary loss, which must be specially pleaded and proved. 1 D. Haggard, Cooley on Torts §164, p. 580 (4th ed. 1932) (hereinafter Cooley).⁶ "General damages," on the other hand, cover "loss of reputation, shame, mortification, injury to the feelings and the like [**512] and need not be alleged in detail and require no proof." *Id.*, §164, at 579.⁷

5 Libel *per quod* and slander (as opposed to libel and slander *per se*) apply to a communication that is not defamatory on its face but that is defamatory when coupled with some other extrinsic fact. Dobbs §7.2, at 512-513.

6 See also 3 Restatement §575, Comment *b* [***22] ("Special harm . . . is harm of a material and generally of a pecuniary nature"); Dobbs §7.2, at 520 ("Special damages in defamation cases mean pecuniary damages, or at least 'material loss'" (footnote omitted)). Special damages do not include mental or emotional distress. See 3 Restatement §575, Comment *c* ("The emotional distress caused to the person slandered by his knowledge that he has been defamed is not special harm and this is so although the distress results in a serious illness"); Dobbs §7.2, at 520 ("Even under the more modern approach, special damages in defamation cases must be economic in nature, and it is not enough that the plaintiff has suffered harm to reputation, mental anguish or other dignitary harm, unless he has also suffered the loss of something having economic value").

7 See also *id.*, §3.2, at 139 (explaining that noneconomic harms "are called general damages"); W. Prosser, *Law of Torts* §112, p. 761 (4th ed. 1971) (noting that "'general' damages may be recovered for the injury to the plaintiff's reputation, his wounded feelings and humiliation, and resulting physical illness and pain, as well as estimated future damages of the same kind" (footnotes omitted)); [***23] 3 Restatement §621, Comment *a* (stating that, in actions for defamation, a plaintiff may recover general damages for "impairment of his reputation or, through loss of reputation, to his other interests").

This parallel between the Privacy Act and the common-law torts of libel *per quod* and slander suggests the possibility that Congress intended the term "actual damages" in the Act to mean special damages. The basic idea is that Privacy Act victims, like victims of libel *per quod* or slander, are barred from any recovery unless they can first show actual --that is, pecuniary or material-- harm. Upon showing some pecuniary harm, no matter how slight, they can recover the statutory minimum of \$1,000, presumably for any unproven harm. That Congress would choose to use the term "actual damages" instead of "special damages" was not without precedent. The terms had occasionally been used interchangeably. See, e.g., *Wetzel v. Gulf Oil Corp.*, 455 F.2d 857, 862 (CA9 1972) (holding that plaintiff could not establish libel *per quod* because he "did not introduce any valid and sufficient evidence of actual damage"); *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 325 F.2d 761, 765 (CA6 1963) [***24] (stating that "libel per quod standing alone without proof of actual damages . . . will not support a verdict for the plaintiff"); *M & S Furniture Sales Co. v. Edward J. De Bartolo Corp.*, 249 Md. 540, 544, 241 A.2d 126, 128 (1968) ("In the case of words or conduct actionable only *per quod*, the injurious effect must be established by allegations [*1452] and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage"); *Clementson v. Minnesota Tribune Co.*, 45 Minn. 303, 47 N. W. 781 (1891) (distinguishing "actual, or, as they are sometimes termed, 'special,' damages" from "general damages --that is, damages not pecuniary in their nature").⁸

8 The dissent disregards these precedents as the product of careless imprecision. *Post*, at 8, n. 6. But just as we assume that Congress did not act carelessly, we should not be so quick to assume that the courts did. The better explanation for these precedents is not that the courts were careless, but that the term "actual damages" has a varied meaning that, depending on the context, can

be limited to compensation [***25] for only pecuniary harm.

Any doubt about the plausibility of construing "actual damages" in the Privacy Act synonymously with "special damages" is put to rest by Congress' refusal to authorize "general damages." In an uncodified section of the Act, Congress established the Privacy Protection Study Commission to consider, among other things, "whether the Federal Government should be liable for general damages." §5(c)(2)(B)(iii), 88 Stat. 1907, note following 5 U.S.C. §552a, p. 712. As we explained in *Doe*, "Congress left the question of general damages . . . for another day." 540 U.S., at 622, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. Although the Commission later recommended that general damages be allowed, *ibid.*, n. 4, Congress never [**513] amended the Act to include them. For that reason, we held that it was "beyond serious doubt" that general damages are not available for violations of the Privacy Act. *Id.*, at 622, 124 S. Ct. 1204, 157 L. Ed. 2d 1122.

By authorizing recovery for "actual" but not for "general" damages, Congress made clear that it viewed those terms as mutually exclusive. In actions for defamation and related dignitary torts, two categories of compensatory damages are recoverable: general damages and special damages. Cooley §164, at 579; see also 4 [***26] Restatement §867, Comment *d* (1939) (noting that damages for interference with privacy "can be awarded in the same way in which general damages are given for defamation").⁹ Because Congress declined to authorize "general damages," we think it likely that Congress intended "actual damages" in the Privacy Act to mean special damages for proven pecuniary loss.

9 See also *Moriarty v. Lippe*, 162 Conn. 371, 382-383, 294 A.2d 326, 332-333 (1972) ("Having admittedly alleged or proven no special damages, the plaintiff here is limited to a recovery of general damages . . ."); *Meyerle v. Pioneer Publishing Co.*, 45 N. D. 568, 574, 178 N. W. 792, 794 (1920) (*per curiam*) ("Generally speaking, there are recognized two classes of damages in libel cases, general damages and special damages"); *Winans v. Chapman*, 104 Kan. 664, 666, 180 P. 266, 267 (1919) ("Actual damages include both general and special damages"); *Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 288-289, 38 P. 903, 904 (1894) (explaining that special damages, "as a branch of actual damages[,] may be recovered when actual pecuniary loss has been sustained" and that the "remaining branch of actual damages embraces [***27] recovery for loss of reputation, shame, mortification, injury to feelings, etc."); see gener-

ally Dobbs §7.3, at 531 ("Though the dignitary torts often involve only general damages . . . , they sometimes produce actual pecuniary loss. When this happens, the plaintiff is usually entitled to recover any special damage he can prove . . . "); 1 F. Harper & F. James, *Law of Torts* §5.30, p. 470 (1956) ("When liability for defamation is established, the defendant, in addition to such 'general' damages as may be assessed by the jury, is also liable for any special damage which he has sustained").

Not surprisingly, this interpretation was accepted by the Privacy Protection Study [*1453] Commission, an expert body authorized by Congress and highly sensitive to the Act's goals. The Commission understood "actual damages" in the Act to be "a synonym for special damages as that term is used in defamation cases." *Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission* 530 (July 1977); see also *ibid.* ("The legislative history and language of the Act suggest that Congress meant to restrict recovery to specific pecuniary losses until the Commission could weigh the propriety [***28] of extending the standard of recovery"). Although we are not bound in any way by the Commission's report, we think it confirms the reasonableness of interpreting "actual damages" in the unique context of the Privacy Act as the equivalent of special damages.

D

We do not claim that the contrary reading of the statute accepted by the Court of Appeals and advanced now by respondent is inconceivable. But because the Privacy Act waives the Federal Government's sovereign immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss. *Nordic Village*, 503 U.S., at 34, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181. When waiving the Government's sovereign immunity, Congress must speak unequivocally. *Lane*, 518 U.S., at 192, 116 S. Ct. 2092, 135 L. Ed. 486. Here, we conclude that it did not. As a consequence, we adopt an interpretation [**514] of "actual damages" limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires.

III

None of respondent's contrary arguments suffices to overcome the sovereign immunity canon.

A

Respondent notes that the term "actual damages" has often been defined [***29] broadly in common-law

cases, and in our own, to include all compensatory damages. See Brief for Respondent 18-25. For example, in *Birdsall v. Coolidge*, 93 U.S. 64, 23 L. Ed. 802, 1876 Dec. Comm'r Pat. 503 (1876), a patent infringement case, we observed that "[c]ompensatory damages and actual damages mean the same thing." *Ibid.* And in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), we wrote that actual injury in the defamation context "is not limited to out-of-pocket loss" and that it customarily includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.*, at 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789.

These cases and others cited by respondent stand for the unremarkable point that the term "actual damages" can include nonpecuniary loss. But this generic meaning does not establish with the requisite clarity that the Privacy Act, with its distinctive features, authorizes damages for mental and emotional distress. As we already explained, the term "actual damages" takes on different meanings in different contexts.

B

Respondent's stronger argument is that the exclusion of "general damages" from the statute simply means that there can be no recovery for presumed damages. Privacy Act victims can still [***30] recover for mental and emotional distress, says respondent, so long as it is proved. See Brief for Respondent 54-56.¹⁰

10 The dissent advances the same argument. See *post*, at 9-11.

[*1454] This argument is flawed because it suggests that *proven* mental and emotional distress does not count as general damages. The term "general damages" is not limited to compensation for unproven injuries; it includes compensation for proven injuries as well. See 3 Restatement §621, Comment *a* (noting that general damages compensate for "harm which . . . is proved, or, in the absence of proof, is assumed to have caused to [the plaintiff's] reputation"). To be sure, specific proof of emotional harm is not required to recover general damages for dignitary torts. Dobbs §7.3, at 529. But it does not follow that general damages cannot be recovered for emotional harm that is actually proved.

Aside from the fact that general damages need not be proved, what distinguishes those damages, whether proved or not, from the only other category of compensatory damages available in the relevant common-law suits is the *type* of harm. In defamation and privacy cases, "the affront to the plaintiff's dignity and the emotional harm [***31] done" are "called general damages, to distinguish them from proof of actual economic harm," which is called "special damages." *Id.*, §3.2, at 139; see also

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supra, at 10, 12-13, and nn. 6, 7, 9. Therefore, the converse [**515] of general damages is special damages, not all proven damages, as respondent would have it. Because Congress removed "general damages" from the Act's remedial provision, it is reasonable to infer that Congress foreclosed recovery for nonpecuniary harm, even if such harm can be proved, and instead waived the Government's sovereign immunity only with respect to harm compensable as special damages.

C

Looking beyond the Privacy Act's text, respondent points to the use of the term "actual" damages in the remedial provisions of the FHA, 42 U.S.C. §3613(c), and the FCRA, 15 U.S.C. §§1681n, 1681o. As previously mentioned, courts have held that "actual" damages within the meaning of these statutes include compensation for mental and emotional distress. *Supra*, at 7. Citing the rule of construction that Congress intends the same language in similar statutes to have the same meaning, see *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973) (*per curiam*), [***32] respondent argues that the Privacy Act should also be interpreted as authorizing damages for mental and emotional distress. See Brief for Respondent 25-32.

Assuming for the sake of argument that these lower court decisions are correct, they provide only weak support for respondent's argument here. Since the term "actual damages" can mean different things in different contexts, statutes other than the Privacy Act provide only limited interpretive aid, and that is especially true here. Neither the FHA nor the FCRA contains text that precisely mirrors the Privacy Act.¹¹ In neither of those statutes did Congress specifically decline to authorize recovery for general damages as it did [*1455] in the Privacy Act. *Supra*, at 12-13. And most importantly, none of the lower court cases interpreting the statutes, which respondent has cited, see Brief for Respondent 29-31, involves the sovereign immunity canon.

11 Compare 42 U.S.C. §3613(c)(1) (stating that "the court may award to the plaintiff actual and punitive damages"); 15 U.S.C. §1681n(a)(1) (authorizing "(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or (B) [***33] . . . actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater"); §1681o(a)(1) (authorizing "any actual damages sustained by the consumer as a result of the failure") with 5 U.S.C. §552a(g)(4)(A) (authorizing "actual damages sustained by the individual as a result of the refusal

or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000").

Respondent also points to the FTCA, but the FTCA's general liability provision does not even use the term "actual damages." It instead provides that the "United States shall be liable" for certain tort claims "in the same manner and to the same extent as a private individual" under relevant state law. 28 U.S.C. §2674, P1. For that reason alone, the FTCA's general liability provision is not a reliable source for interpreting the term "actual damages" in the Privacy Act. Nor does the FTCA's wrongful-death provision -- which authorizes "actual or compensatory damages, measured by the pecuniary injuries resulting from such death," §2674, P2--prove that Congress understood the term "actual damages" in the Privacy Act to include nonpecuniary mental and emotional harm. To [***34] the contrary, it proves that actual damages can be understood to entail only pecuniary harm depending on [**516] the context. Because the FTCA, like the FHA and FCRA, does not share the same text or design as the Privacy Act, it is not a fitting analog for construing the Act.

D

Finally, respondent argues that excluding damages for mental and emotional harm would lead to absurd results. Persons suffering relatively minor pecuniary loss would be entitled to recover \$1,000, while others suffering only severe and debilitating mental or emotional distress would get nothing. See Brief for Respondent 33-35.

Contrary to respondent's suggestion, however, there is nothing absurd about a scheme that limits the Government's Privacy Act liability to harm that can be substantiated by proof of tangible economic loss. Respondent insists that such a scheme would frustrate the Privacy Act's remedial purpose, but that ignores the fact that, by deliberately refusing to authorize general damages, Congress intended to cabin relief, not to maximize it.¹²

12 Despite its rhetoric, the dissent does not dispute most of the steps in our analysis. For example, although the dissent belittles the sovereign immunity canon, [***35] the dissent does not call for its abandonment. See *post*, at 2-3. Nor does the dissent point out any error in our understanding of the canon's meaning. See *ibid*. The dissent acknowledges that statutes and judicial opinions sometimes use the term "actual damages" to mean pecuniary harm, see *post*, at 5, and that determining its meaning in a particular statute requires consideration of context, see *ibid*. In addition, the dissent concedes--as it must in light of our reasoning in *Doe v. Chao*, 540 U.S. 614,

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124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004)--that the common law of defamation has relevance in construing the term "actual damages" in the Privacy Act. See *post*, at 7-9.

The dissent's argument thus boils down to this: The text and purpose of the Privacy Act make it clear beyond any reasonable dispute that the term "actual damages," as used in the Act, means compensatory damages for all proven harm and not just damages for pecuniary harm. The dissent reasons that, because the Act seeks to prevent pecuniary and nonpecuniary harm, Congress must have intended to authorize the recovery of money damages from the Federal Government for both types of harm. This inference is plausible, but it surely is not unavoidable. The Act deters [***36] violations of its substantive provisions in other ways -- for instance, by permitting recovery for economic injury; by imposing criminal sanctions for some violations, see 5 U.S.C. §552a(i); and possibly by allowing for injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. §§702, 706; see *Doe, supra*, at 619, n. 1, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (noting that the absence of equitable relief in suits under §§552a(g)(1)(C) or (D) may be explained by the availability of such relief under the APA).

* * *

[*1456] In sum, applying traditional rules of construction, we hold that the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress. Accordingly, the Act does not waive the Federal Government's sovereign immunity from liability for such harms. We therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

DISSENT BY: SOTOMAYOR

DISSENT

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Congress enacted the Privacy Act of 1974 for the stated purpose of safeguarding [***37] individual privacy against [**517] Government invasion. To that end, the Act provides a civil remedy entitling individuals

adversely affected by certain agency misconduct to recover "actual damages" sustained as a result of the unlawful action.

Today the Court holds that "actual damages" is limited to pecuniary loss. Consequently, individuals can no longer recover what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress. That result is at odds with the text, structure, and drafting history of the Act. And it cripples the Act's core purpose of redressing and deterring violations of privacy interests. I respectfully dissent.

I

The majority concludes that "actual damages" in the civil-remedies provision of the Privacy Act allows recovery for pecuniary loss alone. But it concedes that its interpretation is not compelled by the plain text of the statute or otherwise required by any other traditional tool of statutory interpretation. And it candidly acknowledges that a contrary reading is not "inconceivable." *Ante*, at 14. Yet because it considers its reading of "actual damages" to [***38] be "plausible," the majority contends that the canon of sovereign immunity requires adoption of an interpretation most favorable to the Government. *Ibid*.

The canon simply cannot bear the weight the majority ascribes it. "The sovereign immunity canon is just that -- a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (2008) (opinion of ALITO, J.). Here, traditional tools of statutory construction -- the statute's text, structure, drafting history, and purpose -- provide a clear answer: The term "actual damages" permits recovery for all injuries established by competent evidence in the record, whether pecuniary or nonpecuniary, and so encompasses damages for mental and emotional distress. There is no need to seek refuge in a canon of construction, see *id.*, at 589-590, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (declining to rely on canon as there is "no ambiguity left for us to construe" after application of "traditional tools of statutory interpretation and considerations of *stare decisis*"), much less one that has been used so haphazardly in the Court's history, [***39] see *United States v. Nordic Village, Inc.*, 503 U.S. 30, 42, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992) (Stevens, J., dissenting) (canon is "nothing but a judge- [*1457] made rule that is sometimes favored and sometimes disfavored") (collecting cases).

It bears emphasis that we have said repeatedly that, while "we should not take it upon ourselves to *extend* the waiver [of sovereign immunity] beyond that which Con-

gress intended," "[n]either . . . should we assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 117-118, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979) (emphasis added). See also, e.g., *Block v. Neal*, 460 U.S. 289, 298, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced" [**518] (internal quotation marks omitted)). In the Privacy Act, Congress expressly authorized recovery of "actual damages" for certain intentional or willful agency misconduct. The Court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

II

A

"In a statutory construction case, [***40] the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). The language of the civil-remedies provision of the Privacy Act is clear.

At the time Congress drafted the Act, Black's Law Dictionary defined "actual damages" as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury" and as "[s]ynonymous with 'compensatory damages.'" Black's Law Dictionary 467 (rev. 4th ed. 1968) (hereinafter Black's). The majority claims this is a "general" and "notably circular" definition, *ante*, at 7, but it is unclear why. The definition is plain enough: "Actual damages" compensate for actual injury, and thus the term is synonymous with compensatory damages. See Black's 467 (defining "compensatory damages" as damages that "will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury").¹ There is nothing circular [***41] about that definition.² It is the definition this Court adopted more than a century ago when we recognized that "[c]ompensatory damages and actual damages mean the same thing; that is, that the damages shall [*1458] be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered." *Birdsall v. Coolidge*, 93 U.S. 64, 23 L. Ed. 802, 1876 Dec. Com'r Pat. 503 (1876). It is the definition embraced in current legal dictionaries. See Black's 445 (9th ed. 2009) (defining "actual damages" as "[a]n amount awarded to a

complainant to compensate for a proven injury or loss; damages that repay actual losses. -- Also termed compensatory damages; tangible damages; real [**519] damages" (italics omitted)). And it is the definition that accords with the plain and ordinary meaning of the term. See Webster's Third New International Dictionary 22, 571 (2002) (defining "actual" as "existing in fact or reality" and "damages" as "compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right"). Thus, both as a term of art and in its plain meaning, "actual damages" connotes compensation for proven injuries or losses. Nothing in the use of that phrase indicates [***42] proven injuries need be pecuniary in nature.

1 Black's Law Dictionary also defined "actual damages" as synonymous with "general damages." Black's 467. While "general damages" has a specialized meaning of presumed damages in libel and slander cases, see n. 4, *infra*, it more generally can mean damages that "did in fact result from the wrong, directly and proximately." Black's 468.

2 The majority declares the definition circular because "defining 'actual' damages by reference to 'actual' injury is hardly helpful when our task is to determine what Congress meant by 'actual.'" *Ante*, at 9, n. 4. "Actual injury," however, is far from an unhelpful reference. This Court already has recognized in the defamation context that "actual injury is not limited to out-of-pocket loss." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). That accords with the definitions of the terms. See Black's 53, 924 (defining "actual" as "[r]eal; substantial; existing presently in act, having a valid objective existence as opposed to that which is merely theoretical or possible," and "injury" as "[a]ny wrong or damage done to another").

The majority discards all this on the asserted ground that "the precise meaning [***43] of the term 'changes with the specific statute in which it is found.'" *Ante*, at 7 (quoting *622 F.3d 1016, 1029 (CA9 2010)*). Context, of course, is relevant to statutory interpretation; it may provide clues that Congress did not employ a word or phrase in its ordinary meaning. That well-established interpretive rule cannot, however, render irrelevant-as the majority would have it-the ordinary meaning of "actual damages."

Moreover, the authority the majority cites for its claim that "actual damages" has no fixed meaning undermines -- rather than supports -- its holding. Each cited authority involves either a statute in which Congress expressly directed that compensation be measured in

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strictly economic terms, or else a statute (*e.g.*, the Copyright Act of 1909) in which economic loss is the natural and probable consequence of a violation of the defined legal interest.³ Neither factor is present here. Notably absent from the Privacy Act is any provision so much as hinting that "actual damages" should be limited to economic loss. And while ""hurt feelings" over the nature of the [copyright] infringement" may "have no place in the actual damages calculus" under the Copyright Act of 1909, [***44] *ante*, at 8 (quoting in parenthetical *Mackie v. Rieser*, 296 F.3d 909, 917 (CA9 2002)), the majority provides no basis for concluding that "hurt feelings" are equally invalid in an Act concerned with safeguarding individual privacy. Thus, while context is no doubt relevant, the majority's cited authority does little to help its cause in the stated context of this statute.

3 See 28 U.S.C. §2674; 17 U.S.C. §1009(d)(1); 18 U.S.C. §2318(f)(3) (2006 ed., Supp. IV); 17 U.S.C. §101(b) (1970 ed.); 15 U.S.C. §78bb(a) (2006 ed., Supp. IV).

B

Indeed, the relevant statutory context -- the substantive provisions whose breach may trigger suit under the civil-remedies provision-only reinforces the ordinary meaning of "actual damages."

Congress established substantive duties in the Act that are expressly designed to prevent agency conduct resulting in intangible harms to the individual. The Act requires agencies to "establish appropriate administrative, technical, and physical safeguards" to ensure against security breaches that could result in "substantial harm, embarrassment, inconvenience, or unfairness to any individual." 5 U.S.C. §552a(e)(10). It also requires agencies to "maintain all [***45] records" used in making a determination about an individual in a [*1459] manner that is "reasonably necessary to assure fairness to the individual in the determination." §552a(e)(5). Thus an [**520] agency violates the terms of the Act if it fails, *e.g.*, to maintain safeguards protecting against "embarrassment"; there is no additional requirement that the pocketbook be implicated. An agency's intentional or willful violation of those duties triggers liability for "actual damages" under §552a(g)(4) in the event of an adverse impact. §§552a(g)(1)(C)-(D), (g)(4).

Adopting a reading of "actual damages" that permits recovery for pecuniary loss alone creates a disconnect between the Act's substantive and remedial provisions. It allows a swath of Government violations to go unremedied: A federal agency could intentionally or willfully forgo establishing safeguards to protect against embarrassment and no successful private action could be taken against it for the harm Congress identified. Only an in-

terpretation of "actual damages" that permits recovery for nonpecuniary harms harmonizes the Act's substantive and remedial provisions. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) (statutory interpretation [***46] must consider "the broader context of the statute as a whole").⁴

4 It bears noting that the Privacy Act does not authorize injunctive relief when a suit is maintained under 5 U.S.C. §§552a(g)(1)(C) and (D). Rather, injunctive relief is available under the Act only for a limited category of suits: suits to amend a record and suits for access to a record. See §§552a(g)(2), (g)(3). Thus an individual who, like petitioner, brings suit under *subparagraph (g)(1)(C) or (D)* for an intentional or willful violation of the Act will be without a remedy under the majority's reading of "actual damages."

The majority draws a different conclusion from the substantive provisions of the Privacy Act. It (correctly) infers from them that the Act "serves interests similar to those protected by defamation and privacy torts." *Ante*, at 9. It then points to our observation in *Doe v. Chao*, 540 U.S. 614, 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004), that the Act's civil-remedies provision "parallels" the remedial scheme for the common-law torts of defamation *per quod*, which permitted recovery of "general damages" (*i.e.*, presumed damages) only if a plaintiff first establishes "special damages" (*i.e.*, monetary loss).⁵ *Ante*, at 10. That "parallel," [***47] the majority concludes, "suggests the possibility that Congress intended the term 'actual damages' in the Act to mean special damages." *Ante*, at 11.

5 As the majority notes, "general damages" at common law refers to damages "presumed" to accrue from the violation of the legally protected right. No proof of actual injury was required. See D. Dobbs, *Law of Remedies* §7.2, p. 513 (1973) (hereinafter Dobbs); *Doe*, 540 U.S., at 621, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. "Special damages," in contrast, "meant monetary loss." Dobbs §7.2, at 512; *Doe*, 540 U.S., at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. Common-law defamation actions falling within the rubric of defamation *per se* allowed successful plaintiffs to recover "general damages." See Dobbs §7.2, at 513; *Doe*, 540 U.S., at 621, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. This stood in contrast to actions sounding in defamation *per quod*, which permitted recovery only if the plaintiff established "special damages." See Dobbs, §7.2 at 512; *Doe*, 540 U.S., at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. Even in defamation *per quod* cases, a plaintiff could recover nonpecuniary injuries upon estab-

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lishing some pecuniary loss. See Dobbs §7.2, at 521; *Doe*, 540 U.S., at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. See also *ante*, at 10.

The majority reads too much into *Doe*. At issue in that case was the question whether the Act's civil-suit [***48] provision authorized recovery of a guaranteed minimum award of \$1,000 absent proof of some "actual damages." The Court answered in the negative, and in the course of doing so replied to petitioner's argument that [**521] there was "something peculiar in offering some [*1460] guaranteed damages . . . only to those plaintiffs who can demonstrate actual damages." 540 U.S., at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. Although the Court cited the Act's parallels to defamation *per quod* actions in noting that nothing was "peculiar" about the Act's remedial scheme, *Doe* did not take the further step of deciding that "actual damages" means economic loss alone. Indeed, it expressly reserved that question. *Id.*, at 627, n. 12, 124 S. Ct. 1204, 157 L. Ed. 2d 1122.

The majority, moreover, is wrong to conclude that the Act's parallels with defamation *per quod* actions suggest Congress intended "actual damages" to mean "special damages." Quite the opposite. The fact that Congress "would probably have known about" defamation *per quod* actions, *id.*, at 625, 124 S. Ct. 1204, 157 L. Ed. 2d 1122, makes it all the more significant that Congress did not write "special damages" in the civil-remedies provision. This Court is typically not in the business of substituting words we think Congress intended to use for words Congress in [***49] fact used. Yet that is precisely what the majority does when it rewrites "actual damages" to mean "special damages."⁶ In sum, the statutory context, and in particular the Act's substantive provisions, confirms the ordinary meaning of "actual damages." Although the Act shares parallels with common-law defamation torts, such analogies do not warrant a reading of the phrase that is at odds with the statute's plain text.⁷

6 The majority cites a collection of lower court opinions that have used "actual damages" in place of "special damages" to note that Congress would not have been alone in using the former term to refer to the latter. *Ante*, at 11-12. But that a handful of lower courts on occasion have been imprecise in their terminology provides no basis to assume the Legislature has been equally careless in the text of a statute.

7 There is yet another flaw in the majority's reasoning. At common law a plaintiff who successfully established "special damages" in an action for defamation *per quod* could proceed to recover damages for emotional and mental distress. See

ante, at 10; n. 5, *supra*. If "Congress intended the term 'actual damages' in the Act to mean special damages," *ante*, at [***50] 11, then an individual who successfully establishes some pecuniary loss from a violation of the Act—presumably as trivial as the cost of a bottle of Tylenol—should be permitted to recover for emotional and mental distress. The majority, of course, does not accept that result, and its piecemeal embrace of the common law undermines its assertion that Congress intended "special damages" in place of "actual damages."

C

An uncodified provision of the Act, tied to the Act's drafting history, also reinforces the ordinary meaning of "actual damages." As the majority notes, prior to reconciliation, the Senate and House bills contained civil-remedies provisions that were different in a critical respect: The Senate bill allowed for the recovery of "actual and general damages," whereas the House bill allowed for the recovery of "actual damages" alone.⁸ In the reconciliation process, the provision for "general damages" was dropped and an uncodified section of the Act was amended to require the newly established Privacy Protection Study Commission to consider, among its other jobs, "whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful [***51] or intentional violation of the provisions of sections 552a(g)(1)(C) or [**522] (D)." §5(c)(2)(B)(iii), 88 Stat. 1907; see also *Doe*, 540 U.S., at 622, 124 S. Ct. 1204, 157 L. Ed. 2d 1122.

8 See S. 3418, 93d Cong., 2d Sess., §303(c)(1) (1974); H. R. 16373, 93d Cong., 2d Sess., §3 (1974).

As the Court explained in *Doe*, "[t]he deletion of 'general damages' from the bill is fairly seen . . . as a deliberate elimination of any possibility of imputing harm [*1461] and awarding presumed damages." *Id.*, at 623 124 S. Ct. 1204, 157 L. Ed. 2d 1122; see also *id.*, at 622, n. 5 124 S. Ct. 1204, 157 L. Ed. 2d 1122 ("Congress explicitly rejected the proposal to make presumed damages available for Privacy Act violations"). The elimination of presumed damages from the bill can only reasonably imply that what Congress left behind -- "actual damages" -- comprised damages that are not presumed, *i.e.*, damages proven by competent evidence in the record. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (distinguishing in defamation context between presumed damages and damages for actual injuries sustained by competent evidence in the record, which include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"); *Carey*

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v. Piphus, 435 U.S. 247, 262-264, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) [***52] (distinguishing between presumed damages and proven damages for mental and emotional distress).

Rather than view the deletion of general damages (presumed damages) as leaving the converse (proven damages), the majority supposes that the deletion leaves only a subset of proven damages—those of an economic nature, *i.e.*, "special damages." Once again, however, the majority's insistence that "Congress intended 'actual damages' in the Privacy Act to mean special damages for proven pecuniary loss," *ante*, at 13, finds no basis in the statutory text, see *supra*, at 8. And its response to the conclusion that Congress retained recovery for proven damages when it eliminated presumed damages is singularly unsatisfying. The majority declares such a conclusion "flawed" because "general damages" "includes compensation for proven injuries as well," so that "what distinguishes [general] damages, whether proved or not, from the only other category of compensatory damages available in the relevant common-law suits is the *type* of harm" the term encompasses—which the majority takes to be emotional harm alone. *Ante*, at 15-16. That assertion is defective on two scores. *First*, a plaintiff's ability to present [***53] proof of injury in a defamation *per se* action (and to recover for such proven injury) does not alter the definition of "general damages," which we already explained in *Doe* means "presumed damages." 540 U.S., at 621 124 S. Ct. 1204, 157 L. Ed. 2d 1122; see also *id.*, at 623 124 S. Ct. 1204, 157 L. Ed. 2d 1122; n. 5, *supra*. *Second*, "general damages" is not limited to a "type" of harm. The majority's contrary assertion that the term permits recovery only for emotional "types" of harm overlooks the fact that "general damages are partly based on the belief that the plaintiff will suffer unprovable *pecuniary losses*." Dobbs §7.2, at 514 (emphasis added). It thus was established at common law that in a defamation *per se* action, "the plaintiff is usually free to prove whatever actual pecuniary loss he can," and "the jury may be permitted to view the actual pecuniary loss proven as the tip of the iceberg, assume that there is still more [**523] unproven, and award damage accordingly." *Ibid*.

At its core, the majority opinion relies on the following syllogism: The common law employed two terms of art in defamation actions. Because Congress excluded recovery for "general damages," it must have meant to retain recovery only for "special damages." That syllogism, of course, ignores [***54] that there *is* another category of damages. It is the very category Congress used in the text of the Privacy Act: "Actual damages." However much Congress may have drawn "parallels," *ante*, at 10, between the Act and the common-law tort of defamation, the fact remains that Congress expressly choose not to use the words "special damages." 9

9 The majority cites the conclusions of the Privacy Protection Study Commission in support of its interpretation of "actual damages." The majority rightfully does not claim this piece of post-enactment, extratextual material is due any deference; nor do I find its unelaborated conclusions persuasive.

[*1462] D

I turn finally to the statute's purpose, for "[a]s in all cases of statutory interpretation, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979); see also *Dolan v. Postal Service*, 546 U.S. 481, 486, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The purposes of the [***55] Privacy Act could not be more explicit, and they are consistent with interpreting "actual damages" according to its ordinary meaning.

"The historical context of the Act is important to an understanding of its remedial purposes. In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal." Dept. of Justice, Office of Privacy and Civil Liberties, Overview of the Privacy Act 4 (2010). In particular, Congress recognized that "the increasing use of computers and sophisticated information technology . . . has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information." §2(a), 88 Stat. 1896. Identifying the right to privacy as "a personal and fundamental right," Congress found it "necessary and proper" to enact the Privacy Act "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies."

Ibid.

Congress explained that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring [***56] Federal agencies, except as otherwise provided by law, to," *inter alia*, "be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act." §2(b)(6), *ibid*. (emphasis added). That statement is an explicit reference to suits brought under §552a(g)(4); no other provision speaks to a civil suit based on "willful or intentional" agency misconduct. It signals unmistakably con-

gressional recognition that the civil-remedies provision is integral to realizing the Act's purposes.

[**524] Reading "actual damages" to permit recovery for any injury established by competent evidence in the record -- pecuniary or not--best effectuates the statute's basic purpose. Although some privacy invasions no doubt result in economic loss, we have recognized time and again that the primary form of injuries is nonpecuniary, and includes mental distress and personal humiliation. See *Time, Inc. v. Hill*, 385 U.S. 374, 385, n. 9, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress"); see also *Gertz*, 418 U.S., at 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 ("[A]ctual injury" in defamatory falsehood cases "is not limited to out-of-pocket loss. Indeed, [***57] the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"). Accord, 2 Dobbs §7.1.(1), at 259 [*1463] (2d ed. 1993) (privacy is a dignitary interest, and "in a great many of the cases" in which the interest is invaded "the only harm is the affront to the plaintiff's dignity as a human being, the damage to his self-image, and the resulting mental distress"). That accords with common sense.

In interpreting the civil-remedies provision, we must not forget Congress enacted the Privacy Act to protect privacy. The majority's reading of "actual damages" renders the remedial provision impotent in the face of concededly unlawful agency action whenever the injury is solely nonpecuniary. That result is patently at odds with Congress' stated purpose. The majority, however, does not grapple with the ramifications of its opinion. It ac-

knowledges the suggestion that its holding leads to absurd results as it allows individuals suffering relatively minor pecuniary losses to recover \$1,000 while others suffering severe mental anguish to recover nothing. But it concludes that [***58] "there is nothing absurd about a scheme that limits the Government's Privacy Act liability to harm that can be substantiated by proof of tangible economic loss." *Ante*, at 18. Perhaps; it is certainly within Congress' prerogative to enact the statute the majority envisions, namely one that seeks to safeguard against invasions of privacy without remedying the primary harm that results from invasions of privacy. The problem for the majority is that one looks in vain for *any* indication in the text of the statute before us that Congress intended such a result. Nowhere in the Privacy Act does Congress so much as hint that it views a \$5 hit to the pocketbook as more worthy of remedy than debilitating mental distress, and the majority's contrary assumption discounts the gravity of emotional harm caused by an invasion of the personal integrity that privacy protects.

* * *

After today, no matter how debilitating and substantial the resulting mental anguish, an individual harmed by a federal agency's intentional or willful violation of the Privacy Act will be left without a remedy unless he or she is able to prove pecuniary harm. That is not the result Congress intended when it enacted an Act [***59] with the express purpose of safeguarding individual privacy against Government invasion. And it is not a result remotely suggested by anything in the text, structure, or history of the Act. For those reasons, I respectfully dissent.

NO. 11



HSS ENTERPRISES, LLC, Plaintiff, v. AMCO INSURANCE COMPANY, Defendant.

Case No. C06-1485-JPD

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2008 U.S. Dist. LEXIS 11275

February 1, 2008, Decided

February 1, 2008, Filed

SUBSEQUENT HISTORY: Partial summary judgment granted by, Motion denied by, Partial summary judgment denied by *HSS Enters., LLC v. AMCO Ins. Co., 2008 U.S. Dist. LEXIS 31659 (W.D. Wash., Apr. 16, 2008)*

PRIOR HISTORY: *HSS Enters. v. AMCO Ins. Co., 2008 U.S. Dist. LEXIS 11841 (W.D. Wash., Jan. 14, 2008)*

COUNSEL: [*1] For HSS Enterprises LLC, a Washington corporation, Plaintiff: Bruce A. Winchell, LEAD ATTORNEY, Geoffrey M Grindeland, LEAD ATTORNEY, Stephania Camp Denton, MILLS MEYERS SWARTLING, SEATTLE, WA.

For AMCO Insurance Company, an Iowa corporation, Defendant: Sylvia Karen Bamberger, LEAD ATTORNEY, Lawrence Gottlieb, BETTS PATTERSON & MINES, SEATTLE, WA.

JUDGES: JAMES P. DONOHUE, United States Magistrate Judge.

OPINION BY: JAMES P. DONOHUE

OPINION

ORDER DENYING PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

I. INTRODUCTION AND SUMMARY CONCLUSION

The present matter comes before the Court on plaintiff's Motion for Leave to File First Amended Complaint, filed January 14, 2008. Dkt. No. 37. The defendant has

filed a response opposing this motion, see Dkt. No. 41, to which plaintiff has replied. Dkt. No. 43. After careful consideration of the motion, briefs, governing law and the balance of the record, the Court ORDERS that plaintiff's motion (Dkt. No. 37) be DENIED.

II. FACTS AND PROCEDURAL BACKGROUND

This case involves a suit to recover commercial property insurance coverage, extra-contractual damages under Washington's substantive bad faith law, the Washington Consumer Protection Act ("CPA"), and applicable attorneys' fees statutes. [*2] Plaintiff is an auto repair company located in Kennewick, Washington. Its primary business involves the sale and installation of new and used tires and related parts. On September 15, 2005, plaintiff's leased building in Kennewick caught fire. Because the building had no sprinkler system, much of its interior sustained fire, soot, smoke, and water damage. At the time of the fire, plaintiff was insured through defendant.

Due to a one-year suit limitation provision in the insurance policy, plaintiff filed suit in King County Superior Court on September 15, 2006, asserting claims for breach of contract, bad faith, and violation of the CPA. See Dkt. No. 1, Ex. 1. One month later, defendant removed the case to this district pursuant to 28 U.S.C. § 1441. Dkt. No. 1. Plaintiff contends that although defendant has made some partial "advances" on the loss, it has not paid the vast majority of the claimed loss or other expenses and losses attributable to defendant's conduct. The parties are currently in the process of engaging in written discovery, scheduling and taking depositions,

exchanging expert reports, and attempting to mediate the case.

On November 6, 2007, the voters of the State of Washington [*3] approved the Insurance Fair Conduct Act ("IFCA"). *R.C.W. § 48.30.015*. On December 3, 2007, counsel for plaintiff wrote to counsel for defendant, expressing her "understanding that some organizations, . . . have concluded that the Washington Supreme Court is likely to rule that the Act has retroactive application." Dkt. No. 42, Ex. A. Defendant responded by arguing that plaintiff's counsel's "understanding" was without merit because settled case law precluded retroactivity. Dkt. No. 42, Ex. B. Nevertheless, on December 6, 2007, plaintiff provided notice to defendant's counsel and to the Washington State Office of the Insurance Commissioner of its intent to assert claims under the Act. *See* Dkt. No. 38, Ex. A. Thirty-nine days later, on January 14, 2008, plaintiff filed the current motion for leave to amend its complaint--specifically, to add a claim for relief under the IFCA. *See* Dkt. No. 37; *Fed. R. Civ. Pro. 15(a)* (party must seek leave of court or adverse party's written agreement to amend its pleading after a responsive pleading is served).

III. JURISDICTION

Jurisdiction in this matter is not disputed. Pursuant to 28 U.S.C. § 636(c), the parties have consented to having this matter [*4] heard by the undersigned Magistrate Judge.¹

¹ Under the *Erie* Doctrine, a federal court sitting in diversity applies federal procedural law and the substantive law of the forum state--here, the State of Washington. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). Should this Court be faced with a legal question unaddressed by the forum state's judiciary, it must predict how the Washington Supreme Court "would probably rule in a similar case." *King v. Order of United Commercial Travelers*, 333 U.S. 153, 161, 68 S. Ct. 488, 92 L. Ed. 608 (1948).

IV. DISCUSSION

A. Motions to Amend

The Federal Rules of Civil Procedure state that leave to amend "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. According to the Ninth Circuit, this principle "is to be applied with extreme liberality." *Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1090 (9th Cir. 2004) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th

Cir. 2003) (per curiam)). However, this Court may deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments [*5] previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Publ'g.*, 512 F.3d 522, 2008 WL 36630, *8 (9th Cir. Jan 2, 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

In the present case, plaintiff asserts that the IFCA applies retroactively and, even if does not, plaintiff should be permitted to assert claims arising from defendant's post-December 6, 2007 conduct. Defendant contends that plaintiff's amendment is futile because it seeks relief for past conduct under a statute that does not apply retroactively. Defendant further argues that, even if the opposite were true, plaintiff's position is frivolous because there is no basis for prospective claim under the IFCA. The arguments of the parties force the Court to address the scope of the IFCA, both independently and as it relates to the unlawful conduct alleged by the plaintiff.

B. Washington's Insurance Fair Conduct Act

The [*6] IFCA creates a new cause of action against insurance companies for unreasonably denying claims for coverage or benefits by insureds. The statute also provides for the award of treble damages and attorneys' fees:

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section [outlining additional violations of the IFCA], increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in

subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including [*7] expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

R.C.W. § 48.30.015(1).

C. Retroactivity of the IFCA

Whether a law applies retroactively is a question of legislative intent. "As a general proposition, courts disfavor retroactivity" and therefore presume that a newly enacted statute operates prospectively unless it is remedial in nature or the legislature provides for retroactive application. *Densley v. Dep't of Retirement Sys.*, 162 *Wn.2d* 210, 223, 173 *P.3d* 885, 173 *P.3d* 885, 891 (2007) (citing *In re Estate of Burns*, 131 *Wash.2d* 104, 110, 928 *P.2d* 1094 (1997)); *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 *Wash.2d* 603, 618, 146 *P.3d* 914, 922 (2006).² "Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions." *Burns*, 131 *Wash.2d* at 110, 928 *P.2d* at 1096 (citing *Landgraf v. USI Film Prods.*, 511 *U.S.* 244, 270-71, 114 *S. Ct.* 1483, 128 *L. Ed. 2d* 229 (1994)); *see id.* ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."). This "presumption in favor of prospectivity [*8] is strengthened when the Legislature . . . uses only present and future tenses in drafting the statute." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 *Wash.2d* 15, 30, 864 *P.2d* 921, 931 (1993).

2 A remedial statute is one that relates to practices, procedures, and remedies, and is ordinarily applied retroactively when it does not affect a substantive or vested right. *State v. McClendon*, 131 *Wash.2d* 853, 861, 935 *P.2d* 1334, 1339 (1997). A "right" is a legal consequence stemming from certain facts. *Id.* A "remedy" is a procedure established by law to enforce a right. *Id.*

The Washington Legislature has not expressed an intent to apply *R.C.W. § 48.30.015* retroactively, and plaintiff offers no authority suggesting otherwise.³ Furthermore, the statute is couched in present and future tenses. *See id. § 48.30.015(1)* (creating a cause of action for "[a]ny first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits") (emphasis added); *Adcox*, 123 *Wash.2d* at 30, 864 *P.2d* at 931; *Johnston v. Beneficial Mgmt. Corp.*, 85 *Wash.2d* 637, 640 *n.1*, 538 *P.2d* 510,

514 *n.1* (1975). Section one of the IFCA does not apply retroactively.

3 Plaintiff's [*9] citation of cases involving retroactive *amendments* to existing statutes does not change this result. *See* Dkt. No. 37 at 4.

Nor is it remedial. Section one of the Act creates a new cause of action for a claimant "who is unreasonably denied a claim for coverage or payment of benefits." *See R.C.W. § 48.30.015(1)*. The IFCA concerns more than "procedure or forms of remedies," *Agency Budget Corp. v. Washington Ins. Guar. Ass'n*, 93 *Wash.2d* 416, 425, 610 *P.2d* 361, 365 (1980), and does more than create a "supplemental remedy for enforcement of a preexisting right." Dkt. No. 37 at 4. Here, it provides plaintiff with the right to proceed against the defendant for unreasonable conduct falling outside the scope of the other statutory causes of action set forth in plaintiff's complaint. Compare *R.C.W. § 48.30.015(1)*, with *id. § 48.30.015(5)*; *cf. Kittilson v. Ford*, 23 *Wash.App.* 402, 411, 595 *P.2d* 944, 949 (*Wash. Ct. App.* 1979). Furthermore, "[n]ot only does [the IFCA] create a new cause of action but it also imposes a penalty." *Johnston*, 85 *Wash.2d* at 640, 538 *P.2d* at 514. The fact that plaintiff's IFCA claim might arise out of the same factual scenario as his other claims is of no moment. The presumption [*10] controls: *R.C.W. § 48.30.015* should be applied prospectively only.

D. Present or Prospective Nature of the Harm Alleged

Plaintiff's final argument advances a secondary position which occupied one sentence in its motion to amend, unsupported by citation or further explanation. Specifically, plaintiff contends that even if the IFCA does not apply retroactively, it should be permitted to assert claims against defendant based on defendant's "post 12/6/07 failure to pay benefits due under the policy[,] and other unreasonable conduct." Dkt. No. 37 at 4.

The Court disagrees. This argument necessarily relies on pre-IFCA enactment conduct as grounds for a present--and allegedly a continuing--IFCA violation. Such an argument not only raises serious continuing tort and statute of limitations concerns, but it also invokes the same retroactivity position the Court has already rejected.

V. CONCLUSION

For the foregoing reasons, plaintiff's Motion for Leave to File First Amended Complaint (Dkt. No. 37) is DENIED, as such an amendment would be futile. The Clerk of Court is directed to send a copy of this Order to the parties of record.

DATED this 1st day of February, 2008.

/s/ James P. Donohue
JAMES P. DONOHUE

United [*11] States Magistrate Judge

NO. 12



NORGAL SEATTLE PARTNERSHIP, Plaintiff, v. NATIONAL SURETY CORPORATION, et al., Defendants.

Case No. C11-0720RSL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2012 U.S. Dist. LEXIS 55256

April 19, 2012, Decided
April 19, 2012, Filed

PRIOR HISTORY: *Norgal Seattle P'ship v. Nat'l Sur. Corp.*, 2012 U.S. Dist. LEXIS 55255 (W.D. Wash., Apr. 19, 2012)

COUNSEL: [*1] For Norgal Seattle Partnership, doing business as Charbonneau Apartments, Plaintiff: Rick J Wathen, COLE WATHEN LEID & HALL, SEATTLE, WA.

For National Surety Corporation, a stock insurance company of Fireman's fund Insurance Company, Fireman's Fund Insurance Company, a foreign insurer, Defendants: Michael Simpson Rogers, REED MCCLURE, SEATTLE, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on "Defendant's Motion for Partial Summary Judgment." Dkt. # 27. Plaintiff, the operator of an apartment building, seeks insurance coverage for repair costs and business interruption losses incurred when rot compromised the structural integrity of exterior decks on the building. Defendant seeks summary judgment on plaintiff's breach of contract and Insurance Fair Conduct Act claims.

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The party seeking summary [*2] dismissal of a claim "bears the initial responsibility of informing the district court of the basis for its motion" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) and identifying those portions of the materials in the record that show the absence of a genuine issue of material fact (*Fed. R. Civ. P. 56(c)(1)*). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient;" the opposing party must present probative evidence in support of its claim or defense. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

Having reviewed the memoranda, declarations, and exhibits [*3] submitted by the parties, ¹ having heard the arguments of counsel, and taking the evidence in the light most favorable to plaintiff, the Court finds as follows:

1 The Court has also considered the evidence provided by plaintiff with its motion for summary judgment (Dkt. # 29).

BACKGROUND

Plaintiff Norgal Seattle Partnership operates Charbonneau Apartments, a multi-family apartment building located at 1201 Boylston Avenue, Seattle, Washington. Defendant agreed to insure plaintiff from property damage at the apartment building from December 11, 2007, to December 11, 2008. In July 2008, plaintiff discovered that water had intruded into the structure causing rot. Plaintiff reported the loss to defendant and requested coverage under the insurance policy. Exemplary testing of certain exterior decks on all four exterior walls showed that almost 50% of the decks tested were in danger of collapse. Defendant determined that 32 out of 75 exterior decks with corner posts were likely in danger of collapse and offered to make payments for the repair of those 32 decks. Decl. of Michael S. Rogers (Dkt. # 28), Ex. C. Further investigation regarding the scope and cost of repairs and plaintiff's business [*4] income losses were undertaken. Defendant eventually made payments for repair costs totaling approximately \$580,000. Dkt. # 29, Ex. 26.

On October 7, 2009, plaintiff's counsel sent defendant written notice that it was unhappy with the way its claim was being adjusted. Plaintiff specifically complained that it had not received status letters or responses to inquiries and that defendant was delaying consideration of plaintiff's business interruption claim. Plaintiff stated that the notice was provided pursuant to the Insurance Fair Conduct Act. Decl. of Michael S. Rogers (Dkt. # 28), Ex. D. On or about November 13, 2009, defendant paid \$98,669 on the business income loss claim. Dkt. # 29, Ex. 26.

On June 21, 2010, plaintiff's counsel notified defendant that the repair project had been completed, provided "a copy of the final estimate from TR Eggert Construction as well as the final loss of business income calculation," and requested that the claim process be completed. Dkt. # 29, Ex. 25. Defendant noted that the underlying claim had been paid and closed in November 2009, but requested additional information in order to reopen its investigation. Dkt. # 29, Ex. 26. Engineering reports were [*5] provided, and defendant was given access to the building to conduct an inspection. Dkt. # 29, Ex. 31. Based on the information available after the repairs had been completed, defendant's engineer was unable to ascertain whether the post-November 2009 repairs were required because there was an imminent danger of collapse (a covered loss) or whether they were undertaken to repair rot, decay, or deterioration that did not endanger

the structural integrity of the component (an uncovered loss). Dkt. # 29, Ex. 33.

On March 4, 2011, plaintiff's counsel wrote to the Office of Insurance Commissioner complaining that defendant had failed to provide status reports, had failed to make a coverage determination, and had failed to explain why additional time was needed. Decl. of Michael S. Rogers (Dkt. # 28), Ex. E. This action was filed in state court on March 24, 2011.

DISCUSSION

Defendant seeks (a) dismissal of plaintiff's breach of contract claim on the ground that it was not asserted within the two year contractual limitation period and (b) dismissal of the Insurance Fair Conduct Act claim on the ground that plaintiff failed to comply with the statutory notice provisions. Plaintiff argues that [*6] the Court should continue consideration of this motion and the remainder of the case management deadlines because defendant delayed disclosure of its independent adjuster's report.

A. Breach of Contract Claim

The insurance policy at issue bars suit against the insurer under the contract unless "[t]he action is brought within 2 years after the date on which the direct physical loss or damage occurred." Decl. of Michael S. Rogers (Dkt. # 28), Ex. F at NSC00067. The loss at issue in this case was the "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building caused . . . by . . . [h]idden decay of the Covered Property." Decl. of Michael S. Rogers (Dkt. # 28), Ex. F at NSC00074. Although it is not clear exactly what plaintiff knew in July 2008, it became aware of a loss or damage that was potentially covered by defendant's policy and provided notice of the claim. Shortly thereafter, and no later than November 2008, plaintiff had removed portions of the exterior siding, exposed certain structural members that had decayed and were in a state of imminent collapse, and started repair work. Dkt. # 29, Exs. 3, 4, and 8. [*7] More than two years elapsed between the time the "hidden decay" involving a risk of collapse was exposed and the date on which this action was filed in March 2011.

Plaintiff argues that the contractual limitation period did not begin to run until it discovered the full extent of its loss by removing the last bit of exterior siding from the building and revealing the last bit of hidden decay. *Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001), the case on which plaintiff relies, does not support this proposition. Interpreting policy language similar to that at issue here, the Washington Supreme

Court found that the peril insured against continued only until the hidden decay was no longer out of sight. *144 Wn.2d at 140-41*. Once the insured removed portions of the siding and was able to determine that there was a risk of collapse, the contractual suit limitation period began to run: there is no indication that a new limitation period started every time a piece of siding was removed.² Because plaintiff had removed portions of the exterior facade and disclosed the previously hidden decay by no later than November 2008, plaintiff's breach [*8] of contract claim is untimely.

2 It is important to note that plaintiff did not file a separate claim for coverage related to the later-uncovered decay. This is not a case in which the insured had no reason to suspect additional decay elsewhere in the structure and, when the previously-unknown decay was discovered, filed a new claim for coverage under the policy. If that were the case, the argument that the newly-discovered damage triggered a second suit limitation period would be stronger. Rather, all parties anticipated that, as the repairs progressed, additional decay would be uncovered. In keeping with this expectation, when plaintiff sought to recover the additional repair expenses, it tacked the demand onto its pre-existing claim. The suit limitation period for that claim had started to run by November 2008 at the latest, however, and it was incumbent upon plaintiff to file suit within the two year period.

In the alternative, plaintiff argues that defendant should be estopped from relying on the suit limitation provision because it continued to adjust plaintiff's additional claim for damages until March 2011.

The doctrine of equitable estoppel rests on the principle that where a [*9] person, by his acts or representations, causes another to change his position or to refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage.

Dickson v. U.S. Fidelity and Guaranty Co., 77 Wn.2d 785, 788, 466 P.2d 515 (1970). The party asserting estoppel must prove its elements by clear, cogent, and convincing evidence. *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 256, 928 P.2d 1127 (1996). Plaintiff has not identified any act or representation inconsistent with the assertion of the suit limitation provi-

sion. Defendant did not tell plaintiff that it would waive the limitation provision or suggest that it would pay the additional amounts demanded if given a little more time. Defendant's communications with plaintiff during the relevant time frame invariably contained a reservation of all rights under the policy. Dkt. # 29, Exs. 26, 28, 31, and 33. The fact that the insurer proceeded to adjust a claim under its policy -- as required by Washington law -- does not automatically toll the limitation provision. Otherwise every limitation [*10] provision, regardless of the language used, would begin to run only after the insurer made its final coverage determination. Plaintiff, represented by counsel, is presumed to know the terms and conditions of its policy. Defendant apparently did nothing to mislead plaintiff into thinking that it should or could delay filing suit beyond the contractual two year limitations period. Plaintiff had every opportunity to timely file and did not do so.

B. Insurance Fair Conduct Act Claim

The Insurance Fair Conduct Act ("IFCA") authorizes "first party claimant[s] to a policy of insurance who [are] unreasonably denied a claim for coverage or payment of benefits by an insurer [to] bring an action in superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs." *RCW 48.30.015(1)*. In order to bring a claim under IFCA, however, the first party claimant "must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner" at least twenty days before filing suit. *RCW 48.30.015(8)(a)*. The twenty-day window provides the insurer with an opportunity [*11] to cure any deficiencies or violations. "The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed." *RCW 48.30.015(8)(a)*.

There is no indication that plaintiff provided the required notice to defendant. This litigation involves defendant's handling of the claim for additional repair and business interruption losses that was submitted to defendant in June 2010. Plaintiff has not identified, and the Court has not found, any letter to the insurer setting forth the basis for the various causes of actions asserted here.³ In addition, plaintiff did not wait the requisite twenty days after providing written notice to the insurance commissioner. The letter to the insurance commissioner was apparently mailed on March 4, 2011.⁴ By operation of the statute, the notice was received by the commissioner three business days later, on March 9, 2011. Plaintiff filed this lawsuit less than twenty days thereafter.

3 The one letter which specifically mentions IFCA involved an earlier dispute regarding busi-

ness interruption losses that was resolved in November 2009.

4 Plaintiff has not provided proof of service. For purposes of this motion, the [*12] Court assumes that the letter was mailed on the date indicated on its face.

Plaintiff argues that any failure to comply with the notice requirements of IFCA were "technical" and should be overlooked in order to allow an injured party to obtain relief. Although the Washington Supreme Court has not yet addressed this precise issue, "generally the Court of Appeals has required strict compliance with all statutory notice claim provisions except as to the content of a claim." *Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wn.2d 303, 316, 53 P.3d 993 (2002) (collecting cases under various statutes). Given the purpose of the notice requirement -- to allow the insurer to correct violations before suit is filed -- the "failure to comply with a statutorily set time limitation cannot be considered substantial compliance" with the statute. *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 929, 809 P.2d 1377 (1991).⁵

5 Plaintiff's argument regarding the impact of *Fed. R. Civ. P. 54(c)* is misplaced. Plaintiff did not simply forget to request a form of relief to which the evidence shows it was entitled. Rather, plaintiff failed to comply with a statutory prerequisite and is therefore unable to pursue the [*13] statutory claim. A federal procedural rule cannot override or substitute for an element of a state law claim.

C. Fed. R. Civ. P. 56(d) Continuance and Reopening of Discovery

Plaintiff asserts that it needs additional time to conduct discovery in order to respond to defendant's motion for summary judgment. In particular, plaintiff argues that defendant failed to produce a December 2008 independent adjuster's report (Dkt. # 32, Ex. J) until after the close of discovery, that the report suggests that defendant knew that additional repairs would be needed, and that the deposition of the independent adjuster and a second deposition of defendant's in-house adjuster are necessary to "establish that [defendant] was aware of the need for further investigation as early as 2008." Opposition (Dkt. # 32) at 11.

Defendant acknowledges that, through an unexplained oversight, it failed to timely produce the December 2008 report until after the discovery deadline passed on December 4, 2011. Plaintiff has not, however, explained why the disclosure of this document materially impacts the litigation or otherwise requires the reopening of discovery. Plaintiff argues that this report is a "smok-

ing gun" because [*14] it shows that defendant "was aware that as of November 2008 only 25 of the 92 decks at the Insured Property had been inspected" and that "it was likely that additional damage would be uncovered requiring necessary additional investigation." Opposition (Dkt. # 32) at 4. Defendant's awareness of the extent of the investigation in 2008 and the possibility that additional covered losses had occurred is not in genuine dispute. Defendant clearly knew that only a representative sample of the exterior decks with corner posts had been tested: the record shows that it had the much more detailed report prepared by Mark Uchimura related to the same site inspection. In fact, defendant recounted the scope of the investigation and resulting findings in a letter to plaintiffs dated March 10, 2009. Decl. of Michael S. Rogers (Dkt. # 28), Ex. C. The state of defendant's knowledge regarding the limited scope of the initial investigation and the possibility that additional repairs would be needed was established long before the independent adjuster's report was produced in December 2011.

Nor does plaintiff explain why defendant's awareness of the need for further investigation is relevant to the issues [*15] raised in defendant's motion. As discussed above, the mere fact that an insurer takes some time to investigate and adjust a claim under its insurance policy is not enough to trigger the doctrine of equitable estoppel. Whether defendant was actively investigating to identify additional decks in need of repair, had negotiated a settlement of the claim based on the assumption that additional repairs would be necessary, or was sitting back waiting to see if plaintiff made any additional claims, the suit limitation provision established the window of time in which plaintiff could bring a cause of action under the property coverage provisions. Absent clear, cogent, and convincing evidence that defendant made an admission, statement, or act that misled plaintiff into thinking the suit limitation provision would be waived, equitable estoppel does not apply. Because the recently-disclosed adjuster's report does not touch on this issue, plaintiff has failed to show how additional discovery would enable it to present facts essential to its opposition.

CONCLUSION

For all of the foregoing reasons, defendant's motion for summary judgment regarding plaintiff's breach of contract and Insurance Fair [*16] Conduct Act claims (Dkt. # 27) is GRANTED.

Dated this 19th day of April, 2012.

/s/ Robert S. Lasnik

Robert S. Lasnik

United States District Judge

NO. 13



THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a foreign corporation, Plaintiff, v. RICHARD L. KOCH, an individual, Defendant.

CASE NO. C08-5394BHS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

771 F. Supp. 2d 1253; 2009 U.S. Dist. LEXIS 104000

November 9, 2009, Decided
November 9, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by, Motion denied by *Northwestern Mut. Life Ins. Co. v. Koch*, 2010 U.S. Dist. LEXIS 18016 (W.D. Wash., Feb. 10, 2010)

PRIOR HISTORY: *Northwestern Mut. Life Ins. Co. v. Koch*, 2009 U.S. Dist. LEXIS 103926 (W.D. Wash., Nov. 9, 2009)

CASE SUMMARY:

OVERVIEW: Under the *Seventh Amendment*, an insured who was defending an action filed against it by an insurer had a right to a jury on the issue of increased damages when a claim under *Wash. Rev. Code* § 48.30.015 was brought in federal court because § 48.30.015(2) was an express authorization of punitive damages, and such damages were only prohibited in Washington unless expressly authorized.

OUTCOME: Motion granted.

COUNSEL: [**1] For Northwestern Mutual Life Insurance Company, a foreign corporation, Plaintiff: James R Hermsen, LEAD ATTORNEY, DORSEY & WHITNEY LLP, SEATTLE, WA; James E Howard, LEAD ATTORNEY, Robert M Crowley, DORSEY & WHITNEY (WA), SEATTLE, WA.

For Richard L Koch, an individual, Defendant, Counter Claimant: Kenneth R Friedman, FRIEDMAN RUBIN & WHITE, BREMERTON, WA.

For Northwestern Mutual Life Insurance Company, a foreign corporation, Counter Defendant: James E Howard, Robert M Crowley, DORSEY & WHITNEY (WA), SEATTLE, WA.

JUDGES: BENJAMIN H. SETTLE, United States District Judge.

OPINION BY: BENJAMIN H. SETTLE

OPINION

[*1254] ORDER GRANTING DEFENDANT'S MOTION FOR TRIAL BY JURY ON THE ISSUE OF PUNITIVE DAMAGES

This matter comes before the Court on Defendant's Motion for Trial by Jury on the Issue of Punitive Damages. Dkt. 26. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2008, Plaintiff filed a complaint against Defendant seeking declaratory judgment that it was entitled to rescind certain insurance contracts that it issued to Defendant. Dkt. 1. Defendant counterclaimed [**2] that, among other things, Plaintiff violated the Washington Insurance Fair Conduct Act ("IFCA"), *RCW* 48.30.015. Dkt. 6 PP 43-45. On August 18, 2009, Defendant filed a Motion for Trial by Jury on the Issue of Punitive Damages. Dkt. 26. On September 8, 2009, Plaintiff re-

sponded. Dkt. 30. On September 11, 2009, Defendant replied. Dkt. 31.

It is undisputed that the Court has jurisdiction over this matter based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The current issue before the Court arises out of Defendant's claim that Plaintiff violated IFCA by unreasonably denying insurance coverage for the disability insurance policy D1039334. In pertinent part, IFCA provides as follows:

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment [**3] of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to [*1255] an amount not to exceed three times the actual damages.

RCW 48.30.015. Defendant requests a ruling that he is entitled to a jury on *RCW 48.30.015(2)*.

A more complete factual and procedural background is contained in the Court's order of partial summary judgment. Dkt. 48.

II. DISCUSSION

In 2007, the Washington Legislature enacted *RCW 48.30.015(2)* allowing insureds, in certain circumstances, a right to increased "damages." The statute provides that the "court may" increase the damages. Neither party disputes that the statute directs the judge to determine the amount, if any, of increased damages. The Court agrees with this interpretation. Thus, if this action were tried in state court, the instant issue would be moot. The question before the court, however, is whether, under the *Seventh Amendment*, an insured has a right to a jury on the issue of increased damages when a claim under *RCW 48.30.015* is brought in federal court. The Court is unaware of any binding or persuasive precedent resolving an apparent inconsistency between the Washington statute and the *Seventh Amendment*.

Because [**4] the Court's jurisdiction in this action is based on complete diversity, the Court must engage in

a three-part choice-of-law analysis to determine whether Defendant is entitled to a jury. *Hanna v. Plumer*, 380 U.S. 460, 470-74, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). If there is a valid Federal Rule of Procedure on point, then the court must follow federal law. *Id.* at 473-474 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.").

If there is no direct conflict, the Court must follow the *Erie* doctrine and apply state law on substantive issues and federal law on procedural issues. *Id.* at 468 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). The Court's review of the substantive or procedural nature of the state law in question must be informed by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* Finally, the Court must consider whether an overriding federal interest requires application of federal law despite [**5] the substantive nature of the state law in question. *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-39, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958).

In this case, Defendant argues that *Fed. R. Civ. P. 39* is "on point." Dkt. 31 at 3. *Rule 39* provides that "[w]hen a jury trial has been demanded under *Rule 38*, . . . trial on all issues so demanded must be by jury unless . . . the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial." *Rule 38* provides that the "right of trial by jury as declared by the *Seventh Amendment to the Constitution* . . . is preserved to the parties inviolate." The Court agrees that *Rule 39* is "on point" if the *Seventh Amendment* provides the individual right to a trial by jury on the issue punitive damages.

The *Seventh Amendment* provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[*1256] *U.S. Const. amend VII*. The Court is unaware of any Supreme Court or Ninth Circuit case that directly holds that the [**6] "right to jury" clause of the *Seventh Amendment* includes the issue of punitive damages. In fact, the Supreme Court has stated that the "*Seventh Amendment* is silent on the question whether a jury must

determine the remedy in a trial in which it must determine liability." *Tull v. United States*, 481 U.S. 412, 425-426, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). The Court also stated that "[n]othing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial." *Id.* at 426, n. 9.

There is, however, a separate line of cases on the scope of the *Seventh Amendment*. The Third Circuit, in interpreting an almost identical Pennsylvania statute, found "*Tull* inapposite" to the question of whether the *Seventh Amendment* provides a right to a jury trial on the issue of punitive damages. *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 235-236 (3rd Cir. 1997). The court reasoned that

the appropriate precedent is [*Curtis v. Loether*, 415 U.S. 189, 192, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)], in which the Court held that a "damages action under [42 U.S.C. § 3612] . . . is analogous to a number of tort actions recognized at common law. More important, the relief sought here-actual and punitive damages-is the traditional [**7] relief offered in the courts of law." *Id.* at 195-96. Thus, we conclude that the punitive damages remedy in a statutory bad faith action under [the Pennsylvania statute] triggers the *Seventh Amendment* jury trial right, a result consistent with several [Pennsylvania district court] cases that have decided the issue.

Klinger, 115 F.3d at 236.

In this case, the Court finds that the *Klinger* reasoning is persuasive because the Supreme Court has recognized that "punitive damages" are a type of "traditional relief offered in the courts of law." *Curtis*, 415 U.S. at 195. The *Seventh Amendment* preserved the right to a jury on these traditional types of relief. *Id.* at 195-196.

Plaintiff, however, contends that the *Seventh Amendment* is not implicated because increased damages

under *RCW 48.30.015(2)* are not "punitive" damages. Dkt. 30 at 10. This argument is not persuasive. While it is true that there is no common law right to punitive damages in Washington, *see, e.g., Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996), the Washington Supreme Court's "long-standing rule prohibit[s] punitive damages *without express legislative authorization.*" *Id.* (emphasis added). By enacting *RCW 48.30.015(2)*, [**8] the Washington legislature expressly authorized an award of up to three times actual damages. Moreover, the *Dailey* court recognized that the "increased damages" language contained in a different statute was an explicit authorization of punitive damages. *Dailey*, 129 Wn.2d at 577 (citing *RCW 19.86.090* ("the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained")). Therefore, the Court finds that *RCW 48.30.015(2)* is an express authorization of punitive damages.

Because the *Seventh Amendment* provides that a party in federal court is entitled to a jury on the issue of punitive damages, *Federal Rules of Civil Procedure 38* and *39* are on point for the issue of whether Defendant is entitled to a jury on his claim for increased damages under *RCW 48.30.015(2)*. If there is a valid Federal Rule of Procedure on point, then the court must follow federal law. *Hanna*, 380 U.S. at 473-474. The Court [*1257] is bound by the Federal Rules of Procedure and need not consider the remaining elements of the choice of law analysis.

III. ORDER

Therefore, it is hereby

ORDERED that Defendant's Motion for Trial by Jury on the Issue of Punitive Damages [**9] (Dkt. 26) is **GRANTED**.

DATED this 9th day of November, 2009.

/s/ Benjamin H. Settle

BENJAMIN H. SETTLE

United States District Judge

NO. 14



R.W. GRANGER & SONS, INC. ¹ vs. J & S INSULATION, INC.; UNITED STATES FIDELITY & GUARANTY COMPANY, defendant-in-counterclaim.

¹ R.W. Granger & Sons, Inc. (Granger), is not a party to this appeal.

SJC-08338

SUPREME JUDICIAL COURT OF MASSACHUSETTS

435 Mass. 66; 754 N.E.2d 668; 2001 Mass. LEXIS 485

May 10, 2001, Argued
September 6, 2001, Decided

SUBSEQUENT HISTORY: Costs and fees proceeding at *R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 2004 Mass. App. LEXIS 464 (Mass. App. Ct., May 3, 2004)

PRIOR HISTORY: [***1] Worcester. Civil action commenced in the Superior Court Department on May 11, 1992. Claims under *G. L. c. 93A* were heard by Daniel F. Toomey, J., and motions to amend the judgment and for a new trial were heard by him. The Supreme Judicial Court granted an application for direct appellate review.

R.W. Granger & Sons, Inc. v. J&S Insulation, 1999 Mass. Super. LEXIS 210 (Mass. Super. Ct., May 19, 1999)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court Department, Worcester (Massachusetts) entered a judgment finding that appellant insurer willfully or knowingly committed unfair or deceptive business practices in violation of *Mass. Gen. Laws ch. 93A*, and denying the insurer's post-trial motions to set aside the judgment and the award of attorney's fees to appellee insured. The insurer's application for direct appellate review was granted by the state supreme court.

OVERVIEW: On appeal, the insurer argued that the trial court erred in: (1) finding a wilful or knowing violation of *Mass. Gen. Laws ch. 93A*; (2) using the underlying

judgment as the basis for calculating the insured's double damages under *ch. 93A*; and (3) awarding facially unreasonable attorney's fees to the insured on its *ch. 93A* claim. The state supreme court held, first, that the evidence warranted the trial court's ruling that the totality of the insurer's post-verdict conduct was remediable under *Mass. Gen. Laws ch. 93A, § 11*. A remedy was warranted because the insured was forced to pursue its surety bond claim and initiate a *Mass. Gen. Laws ch. 93A* claim against the insurer when the insurer failed to tender payment, or to make any reasonable settlement in favor of the insured following the jury verdict. Second, by awarding the insured double the amount of the judgment on its underlying surety bond claim, the trial court did precisely what the language of the 1989 amendment to *Mass. Gen. Laws ch. 93A, § 11* required. Finally, the award of attorney's fees was properly based on the trial court's review of the unchallenged documentation submitted by the insured's counsel.

OUTCOME: The judgment was affirmed.

HEADNOTES

Consumer Protection Act, Unfair or deceptive act, Damages, Interest, Attorney's fees, Offer of settlement, Surety. *Insurance*, Unfair act or practice, Settlement of claim. *Surety*.

COUNSEL: Anthony R. Zelle (Michael D. Lurie & Mark Holtschneider with him) for United States Fidelity & Guaranty Company.

Gerald I. Katz, of Virginia (Eric B. Travers, of Virginia, & Carol Frisoli with him) for the defendant.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

OPINION BY: MARSHALL

OPINION

[**671] [*67] MARSHALL, C.J. At issue in this appeal is the validity of a substantial punitive judgment entered against United States Fidelity and Guaranty [**672] Company (USF&G) in favor of J & S Insulation, Inc. (J&S). J&S was a subcontractor to R.W. Granger & Sons, Inc. (Granger), the general contractor on construction work at Logan Airport, for whom USF&G was the surety. See *G. L. c. 149, § 29*.² The punitive damages were awarded after a judge in the Superior Court concluded that USF&G had wilfully and knowingly violated *G. L. c. 93A* in the wake [***2] of a jury verdict against Granger on a breach of contract claim by J&S.

2 *General Laws c. 149, § 29*, states in pertinent part:

"Officers or agents contracting in behalf of the commonwealth or in behalf of any . . . public instrumentality for the construction, reconstruction, alteration, remodeling, repair or demolition of public buildings or other public works when the amount of the contract in the case of the commonwealth is more than five thousand dollars, and in any other case is more than two thousand dollars, shall obtain security by bond in an amount not less than one half of the total contract price, for payment by the contractor and subcontractors for labor performed or furnished and materials used or employed therein"

The statute provides further that "in order to obtain the benefit of such bond for any amount claimed due and unpaid at any time, any claimant having a contractual relationship with the contractor principal furnishing the bond, who has not been paid in full for any amount claimed due for the labor, materials, equipment, appliances or transportation included in the paragraph (1) cov-

erage within sixty-five days after the due date for same, shall have the right to enforce any such claim (a) by filing a petition in equity within one year after the day on which such claimant last performed the labor or furnished the labor, materials, equipment, appliances or transportation included in the claim and (b) by prosecuting the claim thereafter by trial in the superior court to final adjudication and execution for the sums justly due the claimant as provided in this section."

[***3] On appeal, USF&G argues that the judge erred in (1) ruling that USF&G wilfully or knowingly committed unfair or deceptive business practices in violation of *G. L. c. 93A*; (2) using [*68] the underlying judgment against it under *G. L. c. 149, § 29*, as the basis for calculating J&S's double damages under *G. L. c. 93A*; and (3) awarding "facially unreasonable" attorney's fees to J&S on its *G. L. c. 93A* claim. USF&G also appeals from the judge's denial of its posttrial motions and its motion for a new trial or rehearing to determine J&S's attorney's fees. We affirm in all respects the judgment against USF&G and the denial of its posttrial motions for relief.

1. *Background.* The circumstances giving rise to the punitive damages award are these. In May, 1992, Granger sued J&S seeking damages for breach of the Logan Airport subcontract. J&S counterclaimed to like effect, adding a claim that by wrongfully withholding payments from J&S, Granger had violated *G. L. c. 93A, § 11*. At the same time, J&S asserted a counterclaim under *G. L. c. 149, § 29*, against USF&G alleging that USF&G was liable to J&S on the surety bond [***4] to the same extent that Granger was liable to it on the subcontract.

A jury trial on the contract claims between Granger and J&S was conducted in October, 1994. The trial judge reserved for later adjudication, without a jury, J&S's claim against Granger under *G. L. c. 93A*, and its claim against USF&G under *G. L. c. 149*. On October 26, 1994, a jury returned a \$ 203,867.31 verdict against Granger in favor of J&S. Some ten months later, on September 6, 1995, judgment entered against Granger in the amount of \$ 307,527.31, the amount of the verdict with interest. That same day, judgment entered in favor of J&S against USF&G as surety pursuant to *G. L. c. 149, § 29*, in the amount of \$ 410,245.83, the amount of the [**673] verdict, interest, and statutory attorney's fees. We explain later the significance of those judgments.

In order to explain our rulings on USF&G's various challenges to the punitive judgment against it, we now summarize in greater detail the procedural events that followed the October, 1994, jury verdict against Granger on J&S's subcontract claim. Following the jury verdict,

J&S immediately made demand on USF&G for payment "on account consistent with [***5] the jury verdict." J&S also informed USF&G that it would separately "deal with" the issue of attorney's fees and costs recoverable under *G. L. c. 149, § 29*. J&S, receiving no response from [*69] USF&G, filed a motion seeking entry of judgment against USF&G, as surety, including treble damages for violations of *G. L. c. 93A, § 11*, and *G. L. c. 176D*. At that time J&S's only claim pending against USF&G was the *G. L. c. 149, § 29*, surety claim.

On February 21, 1995, four months after the jury verdict, the judge permitted J&S to amend its complaint to include a *G. L. c. 93A, § 11*, claim against USF&G; by that date J&S had received no payment or offer of settlement, despite the jury verdict. The judge limited the *G. L. c. 93A* claim against USF&G to events "occurring subsequent to" the jury's October, 1994, verdict establishing the liability of Granger.³

3 The order states that the amendment was limited "to claims of violations of [*G. L. c. 93A, § 11*,] occurring subsequent to the return of the verdict establishing the liability of" Granger. In allowing the motion, the judge noted that "certainly pre-October [1994, the date of the jury verdict,] conduct might be relevant to post-October violations."

[***6] On March 13, 1995, USF&G answered J&S's amended complaint. It both denied that J&S was entitled to the benefits of the surety bond, and that its conduct violated *G. L. c. 93A*. However, at a hearing on March 15, 1995, to address J&S's bond claim, USF&G did not contest the introduction of the payment bond in evidence and presented no evidence or argument to contest its surety liability. On March 16, 1995, USF&G offered to settle all of J&S's claims for \$ 230,000. The offer was promptly rejected.

There matters stood until September 6, 1995, when, as noted above, separate judgment entered against Granger on the underlying subcontract claim in the amount of \$ 307,527.31, representing the subcontract verdict of \$ 203,867.31, together with statutory interest in the amount of \$ 103,660. At the same time, a separate judgment entered against USF&G on J&S's bond claim in the amount of \$ 410,245.83, representing the amount of the jury verdict against Granger, \$ 203,867.31, together with \$ 86,835.02 interest on that claim,⁴ and \$ 119,543.50 in attorney's fees. Finally, on October 6, 1995, Granger and USF&G unconditionally [*70] paid J&S all amounts due on those two judgments,⁵ neither of which [***7] is at issue in this appeal.

4 The judge calculated the interest against USF&G on the bond claim from May 7, 1992,

and the interest against Granger on the contract claim from September 6, 1991.

5 On August 25, 1995, Granger tendered to J&S a check in the amount of \$ 417,189.81. On September 1, 1995, J&S rejected the check from Granger because it was marked "settlement." In October, 1995, J&S accepted another check from Granger in the same amount. The October check was accompanied by a letter from counsel for Granger and USF&G stating that the check was to be "considered an unconditional payment in accordance with [the judge's] order."

Meanwhile, J&S's claims under *G. L. c. 93A* against USF&G and Granger remained to be resolved. A trial of those claims occurred on November 30, 1998. [***674] USF&G did not call any witnesses, nor did it tender any documents in evidence. It was agreed that evidentiary matters received during the 1994 trial on the underlying subcontract would, to the extent material, be considered [***8] by the judge.

At the conclusion of the trial, in a memorandum filed January 22, 1999, the judge ruled against J&S on its *G. L. c. 93A* claim against Granger.⁶ The judge concluded, however, that USF&G "acted, post-verdict, willfully or knowingly in a manner prohibited by *G. L. c. 93A, § 2*." See Part 2, *infra*. He ordered USF&G to pay J&S double damages in the amount of \$ 820,491.66, (representing double the amount of the underlying judgment against USF&G), together with interest on \$ 410,245.83 from February 21, 1995 (the date of J&S's pleading under *G. L. c. 93A* against USF&G), to August 25, 1995 (when Granger and USF&G first proffered payment on the underlying judgments), in the sum of \$ 79,100.62.

6 The judge found that there were no unfair or deceptive acts or practices in Granger's "sorry performance of its contractual obligations to J&S," and that J&S "must be content with its common law remedy."

Following entry of that judgment against it, USF&G filed a motion to amend judgment, [***9] *Mass. R. Civ. P. 59 (e)*, 365 *Mass. 827 (1974)*; or in the alternative to amend, clarify, and correct the findings of the court, *Mass. R. Civ. P. 52 (b)*, as amended, 423 *Mass. 1402 (1996)*, and *Mass. R. Civ. P. 60 (a)*, 365 *Mass. 828 (1974)*. The judge granted USF&G's motion only with respect to the amount of interest awarded to J&S on its *G. L. c. 93A* claim against USF&G.⁷ In addition, the judge awarded [*71] J&S \$ 120,631.52 in attorney's fees with respect to the *G. L. c. 93A* claim.

7 The judge reduced the interest award from \$ 79,100.62 to \$ 25,161.76.

435 Mass. 66, *; 754 N.E.2d 668, **;
2001 Mass. LEXIS 485, ***

On May 27, 1999, USF&G filed a motion pursuant to *Mass. R. Civ. P. 59 (a)*, 365 Mass. 827 (1974), for a new trial or a rehearing on the award of attorney's fees to J&S on the *G. L. c. 93A* claim. The judge denied the motion. USF&G filed an appeal from the judgment under *G. L. c. 93A*, and from the denial of its posttrial motions to set aside that judgment and the award of attorney's fees. We granted its application for [***10] direct appellate review.

2. *USF&G's liability.* We consider first USF&G's challenge to the judge's ruling on liability. It argues that there was insufficient evidence to support a conclusion that it wilfully or knowingly violated *G. L. c. 93A*. We summarize the judge's findings.

On March 16, the day after the hearing on the payment bond, USF&G offered to settle all of J&S's claims for \$ 230,000, which J&S rejected. The judge found that there was no evidence to explain the delay of more than four months from J&S's demand for payment on November 2, 1994, and USF&G's offer of settlement. He also found that the offer was "wholly inadequate" in light of the jury verdict, the "likely" interest calculations, and the attorney's fees "reasonably expected to be awarded."

The judge then ruled that USF&G's "inexplicably tardy" and inadequate offer, and other "cavalier" post-verdict conduct, constituted violations of several provisions of *G. L. c. 176D*.⁸ He found that USF&G had failed to conduct "a reasonable investigation" of Granger's dispute with J&S both prior to and after the jury verdict, in violation [**675] of *G. L. c. 176D, § 3 (9) (d)* (see note 3, *supra* [***11]); failed to exercise its duty to "affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed," in violation of *G. L. c. 176D, § 3 (9) (e)*; and failed to effectuate "prompt, fair and equitable settlements of claims in which liability has become reasonably clear," in violation of *G. L. c. 176D, § 3 (9) (f)*. Additionally, [*72] the judge found that USF&G had violated *G. L. c. 176D, § 3 (9) (g)*, which prohibits an insurer from forcing an insured "to initiate litigation to recover amounts due . . . by offering substantially less than the amounts ultimately recovered," when it compelled J&S to pursue litigation under *G. L. c. 93A*, first by failing to present an offer to settle in response to J&S's November, 1994, demand letter, and later by making an inadequate settlement offer.

8 USF&G does not contest the judge's ruling that the provisions of *G. L. c. 176D* are applicable to a payment bond surety such as USF&G. See *G. L. c. 176D, § 1 (c)*.

[***12] Having found that USF&G had violated these several provisions of *G. L. c. 176D, § 3 (9)*, the

judge then turned to J&S's claim under *G. L. c. 93A*. The violations of *G. L. c. 176D* were "persuasive evidence," the judge said, that USF&G had engaged in "unfairness under Chapter 93A." The judge further found that USF&G had engaged in unfair business practices in violation of *G. L. c. 93A*, independent of any violations of *G. L. c. 176D*. He ruled that USF&G's presentation to J&S of "a manifestly inadequate offer of settlement" had compelled J&S to "re-commence litigation" under *G. L. c. 93A* in February, 1995, and that its March 9, 1995, answer to J&S's claim was "an insincere response calculated solely to avoid the inevitable day of reckoning." The totality of this conduct, the judge concluded, amounted to "willful or knowing unfair and deceptive acts and practices . . . in violation of *G. L. c. 93A*."

USF&G contests both the judge's determination that it was liable to J&S under *G. L. c. 93A* and his denial of its posttrial motions to amend the judgment. We first address USF&G's attack on the judgment itself.

USF&G challenges the liability judgment on three grounds. [***13] First, it asserts that the judge erred in concluding that it had violated *G. L. c. 93A, § 11*, because violations of *G. L. c. 176D* "do not support a claim" under *G. L. c. 93A, § 11*. Second, it argues that, in any event, there was insufficient evidence to support the judge's finding that its conduct after the jury verdict of October 26, 1994, constituted a violation of any provision of *G. L. c. 176D, § 3 (9)*. Third, it asserts that there was no other independent evidentiary basis for the judge's ruling on liability under *G. L. c. 93A* because its postverdict conduct was neither "unfair and deceptive," nor "willful or knowing."

[*73] Before we address the merits of these arguments, we consider a procedural claim raised by J&S, namely that USF&G has failed to preserve "the entirety" of its appellate rights. J&S argues that, because USF&G seeks (as stated in its brief)⁹ "reversal or modification of the lower court's legal conclusions, *not* its factual findings" (emphasis added), USF&G's liability should be deemed waived in light of the "established" principle, according to J&S, that whether a defendant's conduct [***14] is "unfair or deceptive" within the meaning of *G. L. c. 93A* is a question of fact, not law. There is scant merit to the point. A ruling that conduct violates *G. L. c. 93A* is a legal, not a factual, determination. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 474, 583 N.E.2d 806 (1991) (conduct [**676] amounted to "unfair or deceptive act or practice" as matter of law); *Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 414, 578 N.E.2d 789 (1991), S. C., 412 Mass. 703 (1992) ("although whether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact . . . the boundaries of what may qualify for consideration as a [*G. L. c.*] 93A violation is a ques-

tion of law" [citation omitted]). Cf. *Spence v. Boston Edison Co.*, 390 Mass. 604, 616, 459 N.E.2d 80 (1983) (whether conduct was unfair in violation of *G. L. c. 93A* is question of fact).

9 While it says that it does not challenge the judge's findings, USF&G does request "critical assessment" of those findings.

[***15] Next, J&S claims that USF&G has waived its right to contest liability because USF&G challenged the basis of the judge's *G. L. c. 93A* rulings for the first time in its postjudgment motions. J&S points to the fact that USF&G chose not to offer any evidence to justify or even explain its postverdict conduct, and claims that USF&G did not raise *any* of its theories challenging the basis of *G. L. c. 93A* liability before entry of judgment on that claim.

It is, of course, axiomatic that an appellate court need not consider a claim that is asserted for the first time after judgment has entered below. See *Trustees of the Stigmatine Fathers, Inc. v. Secretary of Admin. & Fin.*, 369 Mass. 562, 565, 341 N.E.2d 662 (1976) (argument raised for first time in posttrial motion need not be considered on appeal); *Milton v. Civil Serv. Comm'n*, 365 Mass. 368, 379, 312 N.E.2d 188 (1974) (issue "cannot be raised for the first time" on [*74] appeal). The reason for this fundamental rule of appellate practice is well established: It is important that an appellate court have before it an adequate record and findings concerning a claim to permit it to resolve that claim properly. [***16] See *id.* We therefore consider the merits of appellate arguments to the extent raised by USF&G before the entry of judgment, except where specifically provided. See, e.g., *Mass. R. Civ. P. 52 (a)*, as amended, 423 Mass. 1402 (1996).

Returning now to the merits of USF&G's claims, we may dispose of its first argument on procedural grounds. USF&G argued for the first time in its postjudgment motion that violations of *G. L. c. 176D*, § 3 (9), do not "support" a finding of a violation of *G. L. c. 93A*, § 11. J&S is correct that the point was not raised before the trial judge prior to the entry of judgment, and is therefore not properly before us. See *Trustees of the Stigmatine Fathers, Inc. v. Secretary of Admin. & Fin.*, *supra*; *Milton v. Civil Serv. Comm'n*, *supra*. See also *DiVenuti v. Reardon*, 37 Mass. App. Ct. 73, 79-80, 637 N.E.2d 234 (1994) (letting stand judge's finding that *G. L. c. 176D* violations support finding of *G. L. c. 93A*, § 11, violation where defendant failed to raise issue).

As to USF&G's second argument -- that its postverdict conduct [***17] did not in any event violate any provision of *G. L. c. 176D* -- some but not all aspects of that claim have been waived. J&S claimed at the *G. L. c.*

93A trial that USF&G had violated *G. L. c. 176D*, § 3 (9) (d) ("reasonable investigation"), and (e) ("affirm or deny coverage"), and that USF&G's preverdict failure to investigate Granger's liability was "probative of [its] postverdict lack of diligence in like circumstances," by failing to investigate the dispute between J&S and Granger both before and after the October, 1994, jury verdict, and by denying that it was liable on the surety bond long after the verdict and only in the wake of J&S's initiation of a *G. L. c. 93A* claim against it. In response, USF&G did not adduce any evidence to the contrary, did not raise the issues in any argument at the bench trial, and did not address these subparts of *G. L. c. 176D*, [***677] § 3 (9), in any of its posttrial motions. We do not consider them.

USF&G did, however, preserve its appellate rights to challenge [*75] the judge's rulings under *G. L. c. 176D*, § 3 (9) (f) ("prompt, fair" settlement after liability is "reasonably [***18] clear") and (g) (prohibiting insurers from compelling insureds to institute litigation).¹⁰ On the merits USF&G fares no better. The evidence amply supports the judge's determination that USF&G violated *G. L. c. 176D*, § 3 (9) (f).¹¹ By October, 1994, the date of the jury verdict, liability was "reasonably clear."¹² Liability for purposes of *G. L. c. 176D*, § 3 (9) (f), encompasses both "fault" and "damages." *Clegg v. Butler*, 424 Mass. 413, 421, 676 N.E.2d 1134 (1997). USF&G does not contest that the jury verdict resolved the issue of Granger's "fault," or its own obligation to J&S as Granger's surety. As to damages, it argues only that, because the judge did not rule until July, 1995, on the amount of attorney's fees to which J&S was entitled on the bond, J&S's damages were not "reasonably clear" until that date. Our law is otherwise. For purposes of *G. L. c. 176D* and *G. L. c. 93A*, damages may be "reasonably clear" well before, or indeed in [*76] the absence of, a judicial order resolving every contested issue as to monies owed. See *Clegg v. Butler*, *supra* at 418 ("we reject [the] conclusion [***19] that . . . the insurer owes no duty to the third-party claimant . . . until both liability and damages have been determined in an appropriate, legal forum or agreed upon"). In the circumstances of this case, the jury verdict against Granger and the certainty that USF&G, as Granger's surety, would be responsible for paying that verdict, as well as interest and reasonable attorney's fees, was more than sufficient to subject USF&G to the requirements of *G. L. c. 176D*, § 3 (9) (f).

10 We give USF&G the benefit of some considerable doubt on this point. In his closing argument at trial, USF&G's counsel did not refer to *G. L. c. 176D*, § 3 (9) (f) and (g). He did argue that USF&G had not used any "leveraging tactics" to force J&S to agree to a "low ball" settlement, and that "the \$ 230,000 offer reflects risks, reflects

that there is an issue out there that [has] not been determined."

11 USF&G argues that no liability under *G. L. c. 176D, § 3 (9)*, can attach because on November 2, 1994, J&S "unequivocally" demanded full payment of the jury verdict and interest, and made clear to USF&G that it would not consider any settlement offer in a lesser amount. Because J&S erected such an "extreme" barrier to any settlement negotiations, USF&G continues, any settlement efforts on its part would have been pointless. The judge made no such findings, nor could he, because USF&G introduced no evidence and made no argument to that effect. Cf. *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 652, 679 N.E.2d 248 (1997). In any event, whatever merit there may be to that position, see, e.g., *Forcucci v. United States Fid. & Guar. Co.*, 11 F.3d 1 (1st Cir. 1993), we do not consider the argument because USF&G raised the point for the first time in its posttrial motion to amend the judgment, and it is therefore waived. See *Trustees of the Stigmatine Fathers, Inc. v. Secretary of Admin. & Fin.*, 369 Mass. 562, 565, 341 N.E.2d 662 (1976); *Milton v. Civil Serv. Comm'n*, 365 Mass. 368, 379, 312 N.E.2d 188 (1974). Before filing its posttrial motions, USF&G addressed the allegation that it had violated *G. L. c. 176D, § 3 (9) (f)*, only in its closing argument at the trial of J&S's *G. L. c. 93A* claim. See note 10, *supra*. Even then, USF&G's counsel argued only that its offer of \$ 230,000 was reasonable. He did not assert or even hint that any conduct of J&S had thwarted any efforts to settle the case.

***20]

12 USF&G has not suggested that there were any errors in the underlying trial of the contract issues or that any good faith appeal was contemplated.

The evidence also supports the judge's conclusion that USF&G failed to "effectuate prompt, fair and equitable settlement[]," [**678] the second requirement of *G. L. c. 176D, § 3 (9) (f)*. There is evidence to support a determination that USF&G's settlement attempts were not "prompt": USF&G made its first settlement offer more than four months after the jury verdict in late October, 1994, and J&S's demand in early November, 1994, and USF&G offered no explanation for its subsequent delay (of almost one year) in effectuating payment to J&S.

There was also sufficient evidence to support a finding that USF&G's offer to settle for \$ 230,000 was neither "fair" nor "equitable." USF&G made only the most cursory efforts at trial to argue that its "low-ball" offer

was a reasonable opening response. See note 10, *supra*. By the time USF&G made its only settlement offer, on March 16, 1995, it was (or should have been) aware that J&S [***21] was entitled to recover the underlying jury verdict of more than \$ 203,000, interest in the amount of at least \$ 69,901.86, as well as reasonably expected attorney's fees.¹³ Only the amount of J&S's attorney's fees remained to be quantified. It is of some significance that USF&G offered no [*77] explanation for its actions and introduced no evidence at the *G. L. c. 93A* trial concerning, for example, industry practices. Cf. *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 652, 679 N.E.2d 248 (1997) (insurer introduced expert testimony concerning settlement practices). If a losing party intends to take an appeal and to challenge the basis of the amount of a jury verdict, it may be reasonable to offer a compromised amount in settlement. But no appeal or other challenge to the jury verdict was pending (or ever filed), there is no evidence that any appeal was contemplated, and, as the judge noted, USF&G could not "reasonably justify the quantum of its settlement 'offer' on the grounds that it would, by settlement, surrender an opportunity to challenge the verdict."

13 At the March 15, 1995, hearing on the bond claim, the judge informed the parties that interest on the jury verdict would be assessed against Granger from September 6, 1991, and against USF&G from May 7, 1992. While USF&G is correct that as of March 16, 1995, the amount of attorney's fees had not been adjudicated, there was no longer any question that J&S was entitled to receive attorney's fees. At the hearing on that date, the judge stated to the parties that "I think [J&S] is entitled to [*G. L. c. 149, § 29,*] attorney's fees under the statute . . . for all of [the attorney's] activities with respect to even the underlying suit."

***22] There was also evidence that after J&S rejected what the judge properly found to be a "monetarily unrealistic" and "wholly inadequate" settlement offer, USF&G made no further attempts to settle the claim. The judge's conclusion that USF&G did not effectuate prompt, fair, and equitable settlement of the underlying judgment is supported by the evidence.

The judge's ruling that USF&G compelled J&S to commence litigation, in violation of *G. L. c. 176D, § 3 (9) (g)*, is also sound. That provision "expresses a legislative purpose to penalize the practice of 'low balling,' i.e., offering much less than a case is worth in a situation where liability is either clear or highly likely." *Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 343, 631 N.E.2d 75 (1994). There was ample evidence to support the judge's findings that J&S was forced to pursue its

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claim on the bond for nearly one year after the jury verdict. USF&G "inexplicably" failed to extend any settlement offer for nearly four months after the jury verdict, and only then offered a settlement offer that was "substantially less" than the minimum amount clearly due under the payment bond. [***23] USF&G's denial of liability on the bond (as set forth in its March 13, [**679] 1995, answer) necessitated a hearing, at which USF&G came forward with no basis for contesting liability on the bond. It reasonably may be inferred from the evidence that USF&G denied payment, interposed a groundless denial of liability, and then offered a substantially reduced settlement amount because it sought to leverage a favorable settlement from J&S on the [*78] unresolved attorney's fees, as well as on the pending *G. L. c. 93A* claims.

In sum, the judge's findings and conclusions with respect to USF&G's violation of *G. L. c. 176D, § 3 (9) (f)* and (g), are fully warranted. The judge could rely on the violations of *G. L. c. 176D, § 3 (9)*, as "persuasive evidence," as he termed it, that USF&G wilfully or knowingly engaged in unfair business practices proscribed by *G. L. c. 93A*. See, e.g., *Kiewit Constr. Co. v. Westchester Fire Ins. Co.*, 878 F. Supp. 298, 301-302 (D. Mass. 1995).

As to USF&G's third argument on liability -- that there was no other independent evidentiary basis for *G. L. c. 93A, § 11*, liability [***24] -- here, too, USF&G's record in the trial court before judgment is sparse, at best. In its closing argument, USF&G stated that "there is no evidence that USF&G did anything or failed to do anything that could be considered a violation of 93A" and that "[J&S] simply can't sustain what is a heavy burden in an accusation of unfair and deceptive claim." Although USF&G does not rely here on these aspects of counsel's argument, we conclude that this was sufficient, albeit barely so, to preserve the issue for appellate review.

The evidence warranted the judge's ruling that the "totality of USF&G's postverdict conduct" was remediable under *G. L. c. 93A, § 11*. We have recognized that the "promotion of reasonable settlement offers is a prime goal" of *G. L. c. 93A, § 11*. *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 857, 443 N.E.2d 1308 (1983). To that end, the statute provides a remedy of multiple damages where an insurer "forces plaintiffs to litigate clearly valid claims." *Id.* As we have explained, J&S was forced to pursue its bond claim against USF&G and to initiate a *G. L. c. 93A* claim against USF&G in [***25] February, 1995, when USF&G failed to tender payment, or to make any reasonable settlement in favor of J&S following the jury verdict. The evidence also supported the judge's determination that J&S was compelled to press its claim because USF&G, in its answer to the amended com-

plaint, made an "insincere response calculated solely to avoid the inevitable day of reckoning," and then extended a "monetarily inadequate" offer. The judge did not err in ruling that USF&G's postverdict conduct constituted "unfair and [*79] deceptive acts and practices by USF&G in violation of *G. L. c. 93A*."

Finally, USF&G contends that, even if it did engage in unfair practices within the meaning of *G. L. c. 93A*, it did not do so knowingly or wilfully, and thus may not be subject to double damages. This argument was raised for the first time by USF&G in its posttrial motions.¹⁴ It is waived. See *Trustees of the Stigmatine Fathers, Inc. v. Secretary of Admin. & Fin.*, 369 Mass. 562, 565, 341 N.E.2d 662 (1976); *Milton v. Civil Serv. Comm'n*, 365 Mass. 368, 379, 312 N.E.2d 188 (1974).

14 While USF&G's counsel argued in his closing statement at the *G. L. c. 93A* trial that the liability was not reasonably clear throughout late 1994 and early 1995, and that the \$ 230,000 settlement offer reflected that uncertainty, he made no argument concerning, nor any reference to, punitive damages or wilful or knowing in addressing J&S's claims under *G. L. c. 93A* and *G. L. c. 176D*. USF&G's counsel also failed to address that aspect of the claim at any other point prior to or at the *G. L. c. 93A* trial. We do not consider counsel's generalized arguments concerning liability made only during closing argument adequate to preserve the issue of wilfulness.

[***26] We turn now to USF&G's appeal from the judge's denial of its posttrial motion to amend the liability judgment pursuant to *rule 59 (e)*, or in the alternative to amend, clarify, and correct the judge's findings pursuant to *rule 52 (b)* and *rule 60 (a)*.¹⁵ A motion under *rule 59 (e)* and one under *rule 60 (a)* are addressed to the judge's discretion, and no abuse of discretion is demonstrated here. See *Trustees of the Stigmatine Fathers, Inc. v. Secretary of Admin. & Fin.*, *supra*; *Piedra v. Mercy Hosp., Inc.*, 39 Mass. App. Ct. 184, 188, 653 N.E.2d 1144 (1995). Assertions by counsel that there is no basis for liability is not an adequate record on which to rest a claim that a judge has abused his discretion.

15 In its March 1, 1999, motion, USF&G did not identify which portions of the motion were brought pursuant to which of each of the three procedural rules.

Rule 52 (b) provides in pertinent part that "the court may amend its findings [of fact] or make additional findings and may [***27] amend the judgment accordingly." ¹⁶ It does not authorize challenges to or amendments to conclusions of law. USF&G argues here that it challenges only the judge's "legal conclusions, [*80] not

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[his] factual findings." Because USF&G has not challenged the factual findings of the judge, we are not required to address whether the judge abused his discretion in denying relief under *rule 52 (b)*. Were we inclined to do so, we would in any event conclude that no such abuse has been shown for the same reasons that we rejected USF&G's challenge to the underlying judgment.

16 *Rule 52 (b) of the Massachusetts Rules of Civil Procedure*, as amended, 423 Mass. 1402 (1996), provides that "when findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them"

3. *Damages*. [***28] We next consider USF&G's challenge to the measure of punitive damages awarded to J&S on its *G. L. c. 93A* claim. The judge ordered USF&G to pay double damages,¹⁷ and he calculated those damages by doubling the amount of the judgment against USF&G on J&S's underlying bond claim, \$ 410,245.83, and adding to that the sum of \$ 25,161.76 in interest.

17 The judge indicated that he did not award treble damages against USF&G, as permitted by the statute, because "USF&G's degree of culpability [did] not merit[] a judicial response in the full measure of firepower available under *G. L. c. 93A*."

General Laws c. 93A, § 11, inserted by St. 1972, c. 614, § 2, sets forth the statutory basis for damages against USF&G. It provides in pertinent part that, if "the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the use or employment of the method of competition or the act or practice [***29] was a willful or knowing violation of [*G. L. c. 93A, § 2*]." In 1989, the Legislature amended the statute to define the "actual damages" to be awarded if a defendant's conduct is willful and knowing: 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" (emphasis added). St. 1989, c. 580, § 2.

[**681] We have interpreted the statute, before and after the 1989 amendment, to require a plaintiff who seeks damages under *G. L. c. 93A* to establish a causal link between the insurer's [*81] wrongful conduct and the loss a plaintiff claims to have suffered. See *Kapp v.*

Arbella Mut. Ins. Co., 426 Mass. 683, 685-686, 689 N.E.2d 1347 (1998), quoting *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 653-654, 679 N.E.2d 248 (1997).¹⁸ J&S has met that burden and has established that it is entitled to *G. L. c. 93A* damages: The judge found, correctly, that USF&G's unreasonable settlement practices after the jury verdict on [***30] J&S's subcontract claim denied J&S prompt recovery of the sums owed to it under its subcontract and surety bond.¹⁹

18 *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 689 N.E.2d 1347 (1998), and *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 679 N.E.2d 248 (1997), interpreted the "actual damages" provision of *G. L. c. 93A, § 9 (3)*. In 1989, the Legislature inserted the identical explanation of "actual damages" in that provision and in *G. L. c. 93A, § 11*. See St. 1989, c. 580.

19 The judge explained in his memorandum of decision that he had limited J&S's *G. L. c. 93A* claims to USF&G's violations of the statute after the October 26, 1994, jury verdict because "to permit J&S to amend, *post-verdict*, in order to allege *pre-verdict* . . . violations by USF&G would be unfair" (emphasis in original). J&S has not challenged the judge's ruling limiting its claims to that time period, either in the trial court or on appeal. The claim against USF&G is therefore limited to USF&G's postverdict conduct. However, the judge made it clear that USF&G's preverdict conduct "might be relevant" to whether its postverdict conduct violated the statute. See note 3, *supra*. J&S appropriately introduced evidence of USF&G's preverdict misconduct at the trial on the *G. L. c. 93A* action, arguing that USF&G had failed to meet its obligations under *G. L. c. 176D* to investigate J&S's claim against Granger. USF&G introduced no evidence in response.

The judge stated in his memorandum of decision that, while the evidence of USF&G's preverdict conduct may be "pertinent to divining [USF&G's] corporate state of mind throughout the entirety of its dealings with J&S," he had relied solely on evidence of USF&G's postverdict misconduct in ruling that USF&G violated *G. L. c. 93A*.

[***31] That said, the question remains whether the judge applied the correct measure of damages. We conclude that he did. The 1989 amendment to the statute distinguishes between cases in which single damages are awarded, i.e., where the defendant's conduct is not willful or knowing, and those in which multiple damages are awarded. See *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. at 685, quoting *Yeagle v. Aetna Cas. & Sur. Co.*, 42

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Mass. App. Ct. at 653-654 (1989 amendment "goes on to say that in the particular situation where a claimant has recovered a judgment on the underlying claim, 'actual damages' shall be taken to be the amount of [*82] the judgment for the purpose of bad faith multiplication [*and for that purpose only*]") [emphasis added]).²⁰

20 The Appeals Court has noted correctly that, since its enactment in 1967, *G. L. c. 93A* "has maintained a line of distinction between violations that consist of unfair or deceptive acts or practices, simpliciter, and those that are knowing or wilful or actuated by bad faith. The former are sanctioned by compensatory 'single' damages. Damages for the latter more serious violations are avowedly punitive -- and can be very heavily so when the [1989] amendment applies." *Yeagle v. Aetna Cas. & Sur. Co.*, 42 *Mass. App. Ct. 650, 655, 679 N.E.2d 248* (1997).

[**32]

As to multiple damages, the 1989 amendment also distinguishes between those cases in which a judgment has entered on the underlying claim and those in which no judgment has entered: if the amount of "actual damages" is to be doubled or trebled, and where there has been no judgment on an underlying claim, the "base damages are calculated according to [*682] the interest lost on the money wrongfully withheld by the insurer, compensating claimants for 'the costs and expenses directly resulting from the insurer's conduct.'" *Kapp v. Arbella Mut. Ins. Co.*, *supra* at 686, quoting *Clegg v. Butler*, 424 *Mass. 413, 425, 676 N.E.2d 1134* (1997). If, however, the defendant is subject to multiple damages and the plaintiff has recovered a judgment on the underlying claim, "'actual damages' shall be taken to be the amount of the judgment for the purpose of bad faith multiplication." *Kapp v. Arbella Mut. Ins. Co.*, *supra* at 685, citing *Yeagle v. Aetna Cas. & Sur. Co.*, *supra*.

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 [***33] 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.

While an award to J&S of \$ 845,653.42 may appear excessive in light of the fact that USF&G's postverdict bad faith conduct caused J&S to lose only the use of the money to which it was entitled, the award is consistent with the legislative intent that led to the 1989 amendment. By amending *G. L. c. 93A, §§ 9, 11*, to include a

specific definition of "actual damages to be [*83] multiplied," the Legislature responded directly to our ruling in *Bertassi v. Allstate Ins. Co.*, 402 *Mass. 366, 372-373, 522 N.E.2d 949* (1988), and other cases in which 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." *Kapp v. Arbella Mut. Ins. Co.*, 426 *Mass. at 685-686*, citing *Clegg v. Butler*, *supra* at 424, [***34] and *Yeagle v. Aetna Cas. & Sur. Co.*, *supra* at 655.²¹ 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." *Kapp v. Arbella Mut. Ins. Co.*, *supra* at 686. See *Yeagle v. Aetna Cas. & Sur. Co.*, *supra* at 655 (statutory language threatens defendant with award "that might be many times over the interest factor, [that is] arbitrary in the sense that it exceeded the injury caused by the c. 93A violation, and [that] worked an in terrorem addition to what was already a punitive sanction"). See also *Clegg v. Butler*, 424 *Mass. at 425* ("multiple damages provided under c. 93A are punitive damages intended to penalize insurers who unreasonably [**683] and unfairly force claimants into litigation by wrongfully withholding [***35] insurance proceeds"), and cases cited.

21 The particular concern that led the Legislature to amend the statute is that the "interest basis" or "loss of use" calculation of damages was not sufficiently punitive where "the plaintiff had been obliged to try to the end an action on the underlying claim." *Yeagle v. Aetna Cas. & Sur. Co.*, *supra* at 655. See *Greelish v. Drew*, 35 *Mass. App. Ct. 541, 542 n.3, 622 N.E.2d 1376* (1993) (1989 amendment was "designed to overrule . . . *Bertassi v. Allstate Ins. Co.*, 402 *Mass. 366, 522 N.E.2d 949* [1988] . . . and to clarify that the actual damages to be doubled and tripled were not just lost interest . . . but also included the amount of the underlying judgment that a plaintiff was forced to litigate to recover").

The statutory mandate that a surety who engages in bad faith settlement practices must pay multiples of the amount of the underlying judgment against it fulfills the important public policy of encouraging the [***36] fair and efficient resolution of business [*84] disputes. See *International Fid. Ins. Co. v. Wilson*, 387 *Mass. 841, 857, 443 N.E.2d 1308* (1983) ("prime goal" of *G. L. c. 93A, § 11*, is to encourage reasonable settlement offers).

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As evidenced by this case, protracted litigation is almost certain to follow where a surety fails to pay, or to make reasonable efforts to settle, an indisputably valid claim under a surety bond. The specter of a punitive sanction many times the loss directly caused by the surety's bad faith settlement practices provides an important disincentive to sureties who would force a claimant into litigation to recover monies to which it is clearly entitled.

As to USF&G's contention that the interest and attorney's fees components of the judgment on the underlying bond claim should not have been included in the amount of damages subject to multiplication, the judge was correct to include both components. These were part of the judgment entered against USF&G, and they were part of what USF&G owed under the bond and the statute governing claims on such bonds. It would be contrary to the language of the statute, as well as to the [***37] punitive purpose of the 1989 amendment, to reduce the "amount of the judgment" (in the language of the statute) to exclude these components. See *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass. App. Ct. 748, 756, 673 N.E.2d 84 (1996) (where interest is component of underlying judgment, "actual damages" to be multiplied include both base recovery and interest).²²

22 USF&G's reliance on *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 475 N.E.2d 392 (1985), and *McEvoy Travel Bur., Inc. v. Norton Co.*, 408 Mass. 704, 563 N.E.2d 188 (1990), is misplaced. In *Patry*, attorney's fees were not included in a judgment and we had little difficulty in that case deciding that "attorney's fees are not part of the damages suffered in a *G. L. c. 93A* action." 394 Mass. at 272. Similarly, in *McEvoy* interest charges were not included in any judgment and we addressed only the calculation of prejudgment interest pursuant to *G. L. c. 93A* and the interest statute at issue in that case, *G. L. c. 231, § 6B*. 408 Mass. at 716-717.

[***38] We also reject USF&G's argument that the damages awarded under *G. L. c. 93A* should have been reduced by \$ 410,245.83, the amount that Granger paid in October, 1995, to satisfy the judgment on J&S's underlying claims. As USF&G concedes, the underlying contract and bond claims are separate and distinct from the *G. L. c. 93A* claim. To offer USF&G a "credit" for the amount paid by Granger to satisfy the underlying claims would [*85] contravene the Legislature's intent to impose a stiff penalty under *G. L. c. 93A* on defendants who knowingly or wilfully fail to settle claims where liability on an underlying claim is clear. See *International Fid. Ins. Co. v. Wilson*, *supra* at 856; *Saud v. Fast Forward, Inc.*, 43 Mass. App. Ct. 207, 208-209, 682 N.E.2d 1363 (1997).

4. *Attorney's fees.* We turn last to USF&G's challenge to the attorney's fees and costs awarded to J&S on its *G. L. c. 93A* claim. J&S submitted a claim for \$ 120,631.52 and the judge ordered that judgment be entered in that amount. USF&G contends that the judge's award was "facially unreasonable"; that the judge abused his discretion by making the award without first holding a hearing and by failing to [***39] make "concrete findings"; [***684] and that the judge abused his discretion by rejecting its motion for a new trial or, in the alternative, a rehearing on the issue.

We do not address the merits of USF&G's contention that the award was "facially unreasonable," as it has waived its appellate rights to contest the award, for the following reasons. On March 10, 1999, J&S filed its application for attorney's fees and costs expended in pursuit of its *G. L. c. 93A* claim against USF&G, in an amount of \$ 78,547.95. It also reserved its right to supplement the application based on ongoing work on the claim. The application, served on USF&G, was accompanied by numerous detailed statements. USF&G filed no response, and made no challenge to the application.

On March 30, 1999, the judge forwarded to counsel a proposed order, which stated that J&S would receive "reasonable attorney's fees," incurred by J&S in connection with the pursuit of the *G. L. c. 93A* claim. The proposed order did not specify the amount, and in an accompanying letter, the judge wrote that he "solicited" submissions as to the "mathematical computations" of attorney's fees, adding, "I suggest that your submissions be served no later [***40] than April 16, 1999 and filed no later than April 26, 1999." Lest his suggestion be lost on USF&G, the judge added the following postscript: "I have J&S' Application for Assessment of Attorney's Fees and now await a response from USF&G" (emphasis added). USF&G never responded to the judge's pointed request.

[*86] On April 26, 1999, presumably in response to the judge's invitation, J&S revised its application, and submitted a new request for an award of \$ 120,631.66 in attorney's fees and costs. It served that application on USF&G. Once again, USF&G did not file any response; it neither challenged the appropriateness nor the amount of the claim for attorney's fees. USF&G also did not ask to be heard on the issue. The judge therefore had before him *no* challenge by USF&G to J&S's application for attorney's fees.

On May 20, 1999, the judge entered an award of attorney's fees and costs in the amount sought by J&S, \$ 120,631.52. Only then did USF&G act: It filed a motion to vacate the award. Its request for relief came too late.

USF&G argues that it did not respond to the judge's letter or to the application of J&S because it relied on the

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judgment and order dated January 22, 1999, in [***41] which the judge said that J&S's attorney's fees and costs "shall be determined upon the filing of the appropriate motion and a hearing thereon." USF&G claims that the judge's "about-face" on the need for a hearing constituted an abuse of discretion because USF&G was led to believe it would have an opportunity to challenge J&S's "extraordinary fee request." The claim has no merit. Confronted by absolute silence from USF&G, the judge reasonably could have concluded that USF&G had no basis to challenge the amounts claimed by J&S, and that no hearing was therefore required. The January, 1999, order does not, in any event, provide for an evidentiary hearing. The judge later invited USF&G to articulate its theory (and amount) of reasonable attorney's fees. It never did so. When USF&G failed to challenge or brief the

issue, the judge was fully warranted in concluding that USF&G did not intend to raise any challenge.

We also reject USF&G's contention that the judge abused his discretion by denying USF&G's motion for a new trial, or in the alternative, a rehearing, on the attorney's fees issue. The judge noted that USF&G had "elected not to address the question" when invited to do so. The [***42] judge's award was based on a review of the unchallenged affidavits and documentation submitted by [**685] counsel for J&S. He was not required to be both judge [*87] and advocate for USF&G. There was no abuse of discretion.

The judgment of the Superior Court is affirmed.

So ordered.

NO. 15



RAYONIER, INCORPORATED, Appellant, v. F. Arnold POLSON, Appellee

No. 21121

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

400 F.2d 909; 1968 U.S. App. LEXIS 5876

August 5, 1968

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant corporation challenged a judgment of the United States district court, which awarded appellee joint-venture member treble damages plus interest for trespass and waste in violation of *Wash. Rev. Code Ann. § 64.12.030* due to the alleged wrongful cutting and removal of timber.

OVERVIEW: Appellant corporation contracted to cut timber on Indian land. Appellee joint venture member and the Indian tribal chief entered into a venture to buy and sell timberland in and near the reservation. The chief bought for the venture interest in a property owned by an Indian, but appellant corporation removed the timber pursuant to a contract that sold it the same timber interests. Appellee filed an action against appellant claiming that the chief lacked authority to sell the timber and that its removal was wrongful. The district court entered judgment in favor of appellee and awarded treble damages for trespass pursuant to *Wash. Rev. Code Ann. § 64.12.030* plus interest. On appeal, the court affirmed, but modified the judgment by deducting the amount erroneously awarded as interest and awarded appellee costs. The district court did not err in concluding, based on substantial evidence, that appellant knew or should have known the chief lacked authority or in holding that appellee's conduct did not ratify the contract. The court held appellant failed to meet its burden of proving that appellee unreasonably failed to inform it that the chief acted without authority.

OUTCOME: The court affirmed a judgment awarding appellee joint-venture member treble damages plus interest for trespass due to the alleged wrongful cutting and removal of timber from an Indian reservation by appel-

lant corporation because the district court's findings were sufficient. The court modified the judgment by deducting the amount that was erroneously allowed as interest and awarded costs to appellee.

JUDGES: [**1] Barnes, Hamlin and Koelsch, Circuit Judges.

OPINION BY: KOELSCH

OPINION

[*913] KOELSCH, Circuit Judge.

This is an appeal by Rayonier, Inc.¹ from an adverse judgment in an action brought in the United States District Court by F. Arnold Polson to recover damages for the alleged wrongful cutting and removal of timber. Jurisdiction of the district court was rested upon diversity of citizenship of the parties.

1 Rayonier is a corporation organized under Delaware law and with its principal place of business in New York. Among its activities Rayonier carries on extensive timber purchasing and cutting on the Quinault Indian Reservation, pursuant to a master timber cutting contract it executed in 1952 with the Superintendent of the Western Washington Indian Agency. Under that contract, which was known as the Crane Creek contract, Rayonier agreed to purchase on stated terms and conditions all merchantable timber located on trust allotments in the Crane Creek cutting unit of the Quinault Indian Reservation that were offered for sale by the Indian owner to Rayonier. The contract gave Rayonier in effect a

monopoly over the cutting of timber on the Indian land until 1986.

[**2] During 1947, Polson and one Cleveland Jackson, now deceased, entered into a joint venture to buy and sell timber and timberland in and near the Quinault Indian Reservation in Western Washington. Jackson's position as Chief of the Quinault Indian Tribe made it advantageous for him to deal with the Indians and he did the purchasing while Polson provided the money.

In 1951 Jackson purchased for the venture the undivided one-half interest of Wallace Bumgarner in property known as the Bumgarner Allotments. This property had been set aside by the government for two Quinault Indian children, Jean and Shirley Bumgarner; on their death during minority their interests passed in equal shares to their parents, Wallace and Nina Bumgarner. Wallace, a non-Indian, had thereupon received a patent for his one-half but, since Nina was an Indian, the government continued to hold hers in trust.

In January 1960, shortly after Nina entered into contract with Rayonier, Inc. to sell to it her interest in the merchantable timber on the Bumgarner Allotments, Jackson executed a similar contract purportedly on behalf of the joint venture.² Rayonier, Inc. commenced logging in January 1961 and by July had [**3] cut and removed substantiall all timber from the property.

2 The contract between Nina Bumgarner and Rayonier was entered into pursuant to the terms of the Crane Creek contract. See note 1 supra. The contract was actually executed by Mr. Libby, the acting Superintendent of the Western Washington Indian Agency, on behalf of Nina Bumgarner. The contract was the result of a prolonged period of negotiation among the Superintendent, Nina Bumgarner, Rayonier and Jackson. Nina had wished to find a way to realize on her interest in the property for many years but, because she owned only an undivided one-half interest, the marketability of her interest proved difficult without the agreement of the owner of the other one-half interest. Although the principal value of the land was in its timber, it was first necessary to acquire the agreement from the owners of the other undivided one-half interest in order to place Nina Bumgarner's interest under the Crane Creek contract and for a number of years the owners had refused to allow their interest to be cut. Finally in July of 1959, Jackson purported to give such agreement and the contract between Nina Bumgarner and Rayonier followed. The formal contract between Jackson and Rayonier was executed in January 1960.

[**4] Thereafter in August 1962 Polson commenced this suit against Rayonier. His claim in substance was that Jackson lacked authority to sell the timber and that its removal by Rayonier was wrongful. He asserted his claim in the alternative under two Washington statutes, one of which, *Wash.Rev.Code Ann. § 64.12.030*, authorizes the allowance of treble damages for timber trespass and the [*914] other, *Wash.Rev.Code Ann. 64.12.020*, treble damages for waste.

The district court, sitting without a jury, found the issues for Polson under the trespass statute³ and, pursuant to a stipulation that the joint venture damages were \$23,000, entered judgment for Polson in treble this amount together with interest at the legal rate on the single damages from the date of trespass, less an offset.⁴ The net judgment was \$54,530.72 plus costs.

3 In addition, the district court judge held: "However, if on appellate review it should be determined that the action does not lie in trespass, I find that it should and does lie in waste." In view of our disposition of this appeal we need not consider this alternative basis for recovery.

[**5]

4 The offset consisted of the funds which Rayonier had paid to Jackson's estate pursuant to the Rayonier-Jackson contract and which, as a result of a settlement agreement between Polson and Anna Jackson, executrix of Jackson's estate, had been placed in escrow pending the outcome of the present action. See discussion re ratification infra at 1011.

Rayonier, Inc. does not seriously contend that Jackson possessed actual authority to make a binding contract. The evidence was undisputed that in 1953 Jackson had signed a formal declaration of trust in which he stated that he held the interest in the Bumgarner Allotments as trustee "without power to sell, exchange, convey, mortgage, or otherwise encumber the same or contract in respect thereto except in accordance with the terms of said [1951 joint venture] agreement. * * *" And the joint venture agreement provided that no valid contract could be made except with the consent of both parties. Polson had never given such consent.

Rayonier does, however, vigorously contend that Cleveland Jackson, as a member and manager of the joint venture, possessed [**6] inherent and apparent authority to enter into the contract on its behalf. See *Restatement (Second) of Agency §§ 8, 8A* (1958). It argues that Jackson was simply carrying on the business in the usual way and that therefore the joint venture was bound. See *Wash. Rev.Code Ann. § 25.04.090(1)*.

A joint venture is in the nature of a partnership and, under Washington law, the relations of the parties in each of those associations are so similar that they are generally tested by the same rules [*Paulson v. McMillan*, 8 Wash.2d 295, 298, 111 P.2d 983, 984 (1941); *Barrington v. Murry*, 35 Wash.2d 744, 752, 215 P.2d 433, 438 (1950); *Wash.Rev.Code Ann. § 25.04.060*]; thus a member of a joint venture, like the member of a partnership, is deemed to be the agent of the others when he is carrying on its business in the usual manner, even though he lacks actual authority to do so. *Wash.Rev.Code Ann. § 25.04.090(1)*. However, if his authority is limited and the party with whom he is dealing knows of the limitation, then the partnership or joint venture is not bound by his unauthorized action [*Wash. Rev.Code Ann. § 25.04.090(4)*]; and knowledge of a fact exists " * * * not [**7] only when [the party] has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith." *Wash. Rev.Code Ann. § 25.04.030(1)*; *Lamb v. General Associates, Inc.*, 60 Wash.2d 623, 627-628, 374 P.2d 677, 680 (1962).

The district court did not err in concluding that Rayonier knew or ought to have known of Jackson's lack of authority. There was substantial evidence, not only that Rayonier knew that the property belonged to the joint venture but also that Rayonier knew of the terms of the joint venture agreement.⁵ Moreover, the limitations on Jackson's authority had been specifically pointed [**915] out to Rayonier on an earlier occasion. In 1954 Jackson and Rayonier negotiated a letter of intent involving rights of way over joint venture property, including the Bumgarner Allotments. Upon learning of this, Polson sent a registered letter to Rayonier stating: "Cleveland Jackson holds title as trustee only and was without power or authority to contract in respect thereto except in accordance with the terms of the 1951 joint venture agreement." He added that Jackson's action was unauthorized; that he, Polson, was [**8] one of the beneficiaries of the trust agreement and should be consulted with respect to the property. On this evidence the district court was justified in concluding that Rayonier was not in a position to assert in good faith that Jackson had inherent or apparent authority to execute the timber cutting contract.⁶

5 It is admitted that Rayonier had a copy of the agreement as early as 1954 and that L. J. Forrest, a Vice President of Rayonier who helped negotiate the Rayonier-Jackson contract, had read the agreement prior to the execution of that contract. In addition, the evidence indicates that Rayonier's employees had discussed the significance of the fact that the property was subject to the joint venture agreement prior to the execution of the Rayonier-Jackson contract.

6 Moreover, Rayonier's contention that the execution of timber cutting contracts was part of the "usual" business of the joint venture does not appear to be supported by the record. It is true that Jackson had purchased some property which was already subject to timber cutting contracts; however, it appears that the execution by Jackson of the Rayonier-Jackson timber cutting contract was a unique endeavor, rather than part of the usual business of the joint venture. We also note that Jackson was on a \$400 per month retainer with Rayonier at the time he executed the Rayonier-Jackson contract.

[**9] Rayonier additionally contends that the district court erred in not holding that Polson ratified the Rayonier-Jackson contract.

Ratification is the affirmance by a person of a prior unauthorized act, whereby the act is given effect as if originally authorized by him. *Restatement (Second) of Agency § 82* (1958); *Dorsey v. Strand*, 21 Wash.2d 217, 230, 150 P.2d 702, 709 (1944). Such affirmance can be established by any conduct manifesting an election to treat an unauthorized act as authorized or conduct justifiable only if there were such an election. *Restatement (Second) of Agency §§ 83, 93* (1958). Conduct which may be held to manifest an election to affirm an unauthorized contract includes the failure to repudiate the contract [*Restatement (Second) of Agency § 94* (1958); *Tobias v. Towle*, 179 Wash. 101, 105, 35 P.2d 1114, 1116 (1934) aff'd on rehearing, 179 Wash. 101, 41 P.2d 1119 (1935)], as well as affirmative acts which can be justified only if there were an election to authorize the contract. *Restatement (Second) of Agency §§ 97, 98* (1958). Rayonier argues that Polson is bound both because of his long delay before repudiating the contract [**10] and because of various affirmative acts.

Although Jackson and Rayonier executed the contract in January 1960, Polson did not object to it until July 1962, a period of over two years. However, the mere passage of time does not necessarily operate to establish ratification. *Restatement (Second) of Agency § 94, comment a* at 244 (1958). In order to infer an election to ratify a contract it is, of course, necessary that the party to be charged have full knowledge of all material facts [*Dorsey v. Strand*, 21 Wash.2d 217, 230, 150 P.2d 702, 709 (1944); *Restatement (Second) of Agency § 91* (1958)]; in the present case a considerable dispute existed concerning when Polson first acquired such knowledge.

To evaluate properly when Polson first acquired full knowledge it is necessary to understand the circumstances which followed the execution of the Rayonier-Jackson contract. At no time during or after the execu-

tion of that contract in January 1960 did Jackson or Rayonier communicate with Polson about it. When Cleveland Jackson died in November of 1960 Rayonier dealt solely with his executrix Anna Jackson, made all payments to Jackson's estate, and continued to neglect [**11] or avoid contacting Polson. Moreover, Jackson's death left the affairs of the joint venture in considerable confusion. Shortly before Jackson's [*916] death Polson had asked his attorneys to "check into" the holding of the joint venture. This investigation continued for well over a year after Jackson's death; it disclosed that Jackson was guilty of embezzlement and that he had violated his fiduciary duties in many other ways. However, it proved difficult to untangle the complex affairs of the joint venture. In addition, title to various joint venture properties, including the one-half interest in the Bumgarner Allotments, was the subject of dispute in the probate of Jackson's estate, until July 12, 1961, when title was finally determined. By that time Rayonier had substantially completed its logging operations. Polson was then in the difficult position of trying to preserve the proceeds of the contract, which had been paid to Jackson's estate, while establishing whether he, Polson, was bound by Jackson's acts. Investigation continued through the remainder of 1961 and early 1962; in July of 1962 Polson notified Rayonier that its contract with Jackson was unauthorized, and in August [**12] Polson commenced this action.

The district court found that Polson did not acquire full knowledge of all material facts until July 1961. In view of the evidence we cannot say that this finding was clearly erroneous. However, Rayonier points out that more than a year elapsed after Polson acquired such knowledge before he objected, and argues that this prolonged delay constituted ratification. The mere fact that Polson had knowledge for such a period does not necessarily establish ratification; rather, the delay must have been such that under the circumstances an inference of an election to ratify the contract was required. *Restatement (Second) of Agency* § 97, *comment a* at 244 (1958). The district court, however, concluded that Rayonier had failed to sustain its burden of proving "that Polson's failure to inform Rayonier that Jackson's conduct was unauthorized was unreasonable under the circumstances." The evidence likewise supports this conclusion.

Rayonier also contends that by his affirmative actions Polson ratified the contract. These particular acts were: first, Polson's filing of a creditor's claim with Jackson's estate in June 1961; second, several oral demands made by [**13] Polson's attorney on Jackson's executrix, Anna Jackson, during 1961 and 1962; third, Polson's filing a suit against Anna Jackson; finally, a settlement agreement entered by Polson and Anna Jackson.

We cannot say that the district court erred in not holding that any of these acts constituted an election to affirm the contract.

First, the creditor's claim was ambiguous with respect to the source of the moneys that gave rise to the claim. Nowhere did the claim specify or even mention the Rayonier-Jackson contract. It was merely a general claim for money received by Jackson from the sale of timber on joint venture lands, and the evidence revealed that there were a number of contracts for such sales which admittedly were valid and binding on Polson. Moreover, Polson's attorney who prepared the claim testified that it did not embrace the proceeds of the Rayonier-Jackson contract. On this evidence the trial judge was not compelled to find a ratification.⁷

7 We need not decide whether the mere filing of a proper creditor's claim necessarily constitutes an acquiescence in the decedent's wrongful conduct.

[**14] Second, there was evidence that the various oral "demands" made during 1961 and 1962 by Polson's attorney on Jackson's estate with respect to the proceeds of the contract were not intended to constitute an approval of Jackson's action, but instead were part of Polson's attempt to maintain the status quo. Polson feared that Anna Jackson might dissipate the funds before it could be finally determined to whom the proceeds [*917] properly belonged. The court was justified in concluding that the so-called demands were essentially requests to preserve the funds pending such a final determination.

Third, Rayonier claims that the suit commenced by Polson against Anna Jackson, individually and as executrix of Jackson's estate, was in part to secure judgment for the proceeds of the unauthorized contract. Under normal circumstances the bringing of such a suit would constitute ratification [*Restatement (Second) of Agency* § 97 (1958)]; however, the situation revealed in this case was not the usual or ordinary one. Polson's suit against Anna Jackson was filed on February 15, 1963, long after his suit against Rayonier; therefore, it could hardly be said to manifest an affirmance of the [**15] contract. Moreover, we see no reason why Polson could not protect himself against an adverse judgment in this case by filing a subsequent action against Jackson's estate. See *Restatement (Second) of Agency* § 97, *comment b* at 251 (1958).

Finally, the suit against Anna Jackson culminated in a settlement agreement by which the proceeds of the Rayonier-Jackson contract were placed in escrow pending the outcome of the present litigation. Rayonier claims that by this settlement agreement Polson exercised do-

minion over the proceeds of the contract and therefore should have been held to have ratified the contract. See *Restatement (Second) of Agency* § 98 (1958). However, the settlement agreement provided in essence that Polson was to receive the proceeds only if he were unsuccessful as against Rayonier, and conversely would not receive the proceeds if he were successful. Thus the settlement agreement appears to be an attempt to preserve the proceeds of the contract pending the outcome of this litigation. On this evidence the trial judge was justified in concluding that Rayonier had not established ratification thereby.

Rayonier also contends that Polson was estopped from questioning [**16] the validity of the Rayonier-Jackson contract under the well settled principle that "If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent." *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 700, 44 P.2d 785, 787 (1935); *Huff v. Northern Pacific Railway Co.*, 38 Wash.2d 103, 114-115, 228 P.2d 121, 128 (1951).

Of course Polson cannot be faulted because of his failure to object prior to July 1961, for as already noted the trial court found on substantial evidence that until that date he lacked essential knowledge. *Consolidated Freight Lines, Inc. v. Groenen*, 10 Wash.2d 672, 677-678, 117 P.2d 966, 968, 137 A.L.R. 1072 (1941); *Blanch v. Pioneer Mining Co.*, 93 Wash. 26, 34, 159 P. 1077, 1080 (1916). Since by that date Rayonier had removed substantially all the timber, Polson's objection thereafter would not have saved Rayonier from any liability.

It is true that, during the intervening period of more than a year between the time Polson acquired full knowledge and the time he brought this suit, Rayonier made a number of substantial payments [**17] on the contract to Jackson's estate.⁸ To that extent, Rayonier suffered a loss. But the court below, finding that "Rayonier had absolutely no right to make these payments other than to Polson; that Rayonier not only had constructive or implied knowledge thereof, but that responsible officers of Rayonier actually knew, or in the exercise of concern for the rights of others should have known, that those payments under the relationship between Jackson and Polson were to be made to or at the [*918] direction of Polson,"⁹ held that no estoppel arose. This was correct. One who seeks to invoke the equitable doctrine of estoppel must himself have been free of fault. *Kozak v. Fairway Finance-Seattle, Inc.*, 60 Wash.2d 500, 504, 374 P.2d 1011, 1013-1014 (1962); 28 *Am.Jur.2d Estoppel and Waiver* § 79 (1966). The Washington Supreme Court recognized this essential requirement in *West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc.*, 66 Wash.2d 513, 520, 403 P.2d 833, 837 (1965), when it pointed out that the party asserting estoppel "failed to

show either the blamelessness or the reasonable conduct necessary to assert estoppel."

8 It appears that Rayonier paid \$12,214.81 to Cleveland Jackson's estate in July and August of 1961. However, Rayonier was given a credit for the full amount of money paid to Jackson's estate pursuant to the Rayonier-Jackson contract.

[**18]

9 The 1951 joint venture agreement provided that "all proceeds thereof [from logging contracts] as received shall be paid to Polson." In addition, upon Jackson's death the agreement provided that Polson was to take over as trustee of all the property and all funds were to be received by him and then distributed pursuant to the agreement.

Rayonier next contends that the Washington timber trespass statute, *Wash.Rev.Code Ann. § 64.12.030*, on the authority of which the district court trebled the damages, was inapplicable under the facts of this case. That statute provides in relevant part that:

"Whenever any person shall cut down * * * or carry off any tree, timber or shrub on the land of another person * * * without lawful authority, in an action by such person * * * against the person committing such trespasses * * *, if * * * judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be."

Relying on its timber cutting contract with Nina Bumgarner,¹⁰ Rayonier argues that two of the essential statutory [**19] requirements were not met because the timber was neither cut "without lawful authority" nor was it situated "on the land of another."¹¹ We disagree with Rayonier on both points.

10 Rayonier's argument rests on the premise that its contract with Nina Bumgarner was valid. However, the district court concluded that "Mr. Libby [the acting Superintendent of the Western Washington Indian Agency] did not have authority to authorize a contract without the approval of Polson, which approval was not obtained." We believe this conclusion was correct. At the time the timber cutting contract between Nina and Rayonier was executed, the procedure of the Bureau of Indian Affairs of the Department of Interior required that the agreement of all the co-

owners was necessary before a contract could be properly executed [See Act of June 25, 1910, ch. 431, § 7, 36 Stat. 857 as amended 25 U.S.C. § 406 (1964); 65 Decs. U.S.Dept.Interior 101 (1958); *Barclay v. United States*, 166 Ct.Cl. 421, 333 F.2d 847, 859 (1964)] and, as the district court found, Polson's consent was never obtained. Thus, as has previously been held: "Even if approval is given by an agent of the Bureau the sale is void if the agent had no approval power. *United States v. Watashe*, 102 F.2d 428 (10th Cir. 1939)." *Bacher v. Patencio*, 232 F. Supp. 939, 941-942 (S.D.Cal.1964). See also *United States v. Eastman*, 118 F.2d 421 (9th Cir. 1941).

It is interesting to note that the requirement that the consent of all the owners of the land be obtained before a timber cutting contract could be executed proved to be so burdensome that amendments were proposed and adopted in 1964. Those amendments provided in part that the sale of timber was authorized upon the request of the owners of a majority Indian interest in the land. 25 U.S.C. § 406 (1964). In explaining the need for the amendment John A. Carver, Jr., Assistant Secretary of the Interior, stated that:

"The 1910 Act permits a sale of timber from allotted land to be made only when the signatures of all of the owners can be obtained. When there are many owners of undivided interests, it is sometimes impossible to comply with this requirement, and compliance is frequently more costly than warranted." 1964 U.S.Code Cong. & Ad. News, p. 2164.

[**20]

11 Rayonier also asserts that the timber trespass statute contemplates the commission of a common law trespass which, it contends, is generally limited to the wrongful entry by a stranger to the property. Thus it asserts that the statute would generally not apply to a cotenant or his licensee. In pressing this construction of the statute Rayonier first points out that the Washington courts have indicated that the statute is penal in nature and therefore should be strictly construed. Rayonier then asserts that, since the acts described in the statute to be penalized are very similar to the common law action for trespass and those acts are actually referred to as "such tres-

passes" in the statute, the statute should be construed to contemplate a common law trespass.

We cannot agree with Rayonier's interpretation of the statute. It is not at all clear what is required for a "common law trespass;" however, the use of the phrase "such trespasses" in the statute is coupled directly with and in fact merely refers to the specific acts which are previously described in the statute. Some of these acts would not necessarily have constituted common law trespasses [*Simons v. Wilson*, 61 Wash. 574, 575, 112 P. 653, 654 (1911)], and certainly the treble damage recovery provided by the statute was not contemplated at common law. The Washington legislature clearly had particular evils in mind when it enacted the treble damage statute and the legislature was not satisfied to limit recovery either to a common law form of action or a common law standard of recovery.

Since the statute clearly describes the statutory acts which constitute "such trespasses," we believe it would be improper statutory construction to require a common law trespass [See, e.g., *Traxler v. State*, 96 Okl.Cr. 231, 251 P.2d 815 (1952); *Knudson v. Jackson*, 191 Iowa 947, 183 N.W. 391 (1921). See generally 3 Sutherland, Statutory Construction § 5303 at 9-11 (3d ed. 1943); 50 Am.Jur., Statutes, § 262 (1956)]; rather, we conclude that "such trespasses" in the statute was used merely in the more general sense of trespass -- i.e., "doing of an unlawful act or of lawful act in unlawful manner to injury of another person or property" [Black's Law Dictionary 1674 (4th ed. 1951)] -- and the unlawful acts which are contemplated by the statute are specifically delineated therein.

[**21] [*919] The well settled general rule, followed in Washington, is that one cotenant of real property may use and enjoy the entire property to the fullest extent consistent with the ordinary manner of deriving profits from property of like character [See Comment, *The Inter Vivos Rights of Cotenants Inter Se*, 37 Wash.L.Rev. 70 (1962)] and he may grant to other persons freely and without the necessity of the consent of his cotenants, his interest in the property and whatever rights he enjoys. *De La Pole v. Lindley*, 131 Wash. 354, 230 P. 144 (1924); Freeman, *Cotenancy & Partition* § 253 (2d ed. 1886). For example, in the *De La Pole* case a lessee of agricultural land was held not a trespasser as against his lessor's cotenant, although he was required to account to her for her aliquot share of the wheat crop he had raised.

However, a cotenant's right of enjoyment of the common property extends only to the products of its proper use and not to a taking of the land itself. See *Shepard v. Pettit*, 30 Minn. 119, 14 N.W. 511 (1883); *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 56 S.W. 969 (1900); Freeman, *Cotenancy & Partition* [**22] § 299 (2d ed. 1886). "In Washington, standing timber owned by the owner of the real property upon which it is growing has always been regarded as real property." R. Johnson, *Washington Timber Deeds and Contracts*, 32 Wash.L.Rev. 30 (1957). *Engleson v. Port Crescent Shingle Co.*, 74 Wash. 424, 133 P. 1030 (1913); *France v. Deep River Logging Co.*, 79 Wash. 336, 140 P. 361 (1914). Courts generally hold that a cotenant has no right to remove substantial amounts of timber from land having a value primarily for its timber and that to do so constitutes waste for which he is liable. E.g., *Provident Life & Trust Co. v. Wood*, 96 W.Va. 516, 123 S.E. 276, 41 A.L.R. 570 (1924); *Nevels v. Kentucky Lumber Co.*, 108 Ky. 550, 56 S.W. 969 (1900); *Graybiel v. Burke*, 124 Cal.App.2d 255, 268 P.2d 551 (3d Dist. 1954). See generally 2 H. Tiffany, *Real Property* § 651 (3d ed. B. Jones 1939); Annot. 2 A.L.R. 993 (1919); Annot., 41 A.L.R. 582 (1926).

Washington appears to have adopted this rule in *Crodle v. Dodge*, 99 Wash. 121, 168 P. 986 (1917). That was a suit by one of several heirs [**23] to establish her [*920] title to and interest in 160 acres of agricultural and timber land which had been in the exclusive possession of the grantee of the other heirs for many years following the death of the ancestor who was the source of their title. The court concluded that the plaintiff's claim was valid but declined on equitable grounds to order the grantee to render an accounting for the use of the property; however, noting that the grantee was removing timber from the land, the court said:

"As to the timber, however, a different rule should apply. Its removal amounted to waste and, as the plaintiff moved seasonably in the premises, we perceive no reason why she should be denied the right of asserting her claim in this respect. The trees were a part of the realty and the plaintiff should not be deprived of any part of her inheritance."

99 Wash. at 133, 168 P. at 990.

Rayonier's reliance upon *Buchanan v. Jencks*, 38 R.I. 443, 96 A. 307, 2 A.L.R. 986 (1916) is misplaced. It is true that in that case the court held the licensee of one

cotenant not liable to the other cotenants for treble damages under a timber-trespass statute. [**24] But in Rhode Island, timber is not regarded as part of the land as it is in Washington, but rather is held to be like grain or other crops and hence a profit which may be removed without harming the land itself. The Rhode Island court made clear this fundamental distinction when it said: "* * * if the cutting and removal of the ripe product of the lot was a destruction of some portion of the corpus of the estate, there is ample authority for holding that the defendant, although standing in the place of a cotenant, would be liable * * *." *Buchanan v. Jencks*, 38 R.I. 443, 448-449, 96 A. 307, 310, 2 A.L.R. 986 (1916).

Since Nina Bumgarner could not herself remove the timber from the real property without the consent of all the owners, manifestly she could not authorize someone else to do so. Similarly, her contract, though valid to transfer to Rayonier her undivided interest in the timber, did not give rise to an implied license in the land; since she could not herself remove the timber, she was powerless to vest another with a right in the land necessarily incident to such removal.¹² 20 *Am.Jur.2d Cotenancy and Joint Ownership* § 103 (1965).

12 The evidence makes it quite clear that Rayonier understood that it could not cut without the consent of the other one-half interest. For example, Wilton L. Vincent, the manager of Rayonier's Land Department, Northwest Timber Division, testified that he believed it would be a "useless gesture" to contract with Nina "unless the unrestricted half interest were likewise willing to have the allotments logged." Vincent also agreed that he believed that Rayonier "would not be in a position to log the allotments until an agreement was reached with the unrestricted interest." In addition, there is evidence that Rayonier had been told that "it would be up to them to enter into a contract with the owner of the unrestricted portion."

[**25] Rayonier seeks to defeat the award of treble damages on the basis of a further Washington statute, *Wash.Rev.Code Ann. § 64.12.040*, which provides in relevant part that:

"If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, * * * judgment shall only be given for single damages."

This statute was enacted as a companion to the timber trespass statute. It reflects a legislative intention to withhold punitive damages if the trespass was the result of an honest mistake or was committed under circumstances making unwarranted the imposition of exemplary [*921] damages. This is clear from its application by the Washington Supreme Court. For example, in *Hawley v. Sharley*, 40 Wash.2d 47, 48, 240 P.2d 557 (1952), punitive damages were held to be improperly imposed upon one Locke who "inadvertently strayed or trespassed" upon plaintiff's tract which adjoined one of the parcels which he had been hired to clear. Conversely, in *Smith v. Shiflett*, 66 Wash.2d 462, 403 P.2d 364 (1965) [**26] that court sustained such an award on evidence that the defendant Shiflett made no survey nor any other attempt to ascertain the ownership of the lands although he had been advised that plaintiff claimed title. The case against Rayonier is even stronger than the one against Shiflett, for here Rayonier had knowledge both actual and constructive of Polson's interest in the joint venture property and Jackson's lack of authority with respect to sales of joint venture property. The trial court characterized Rayonier's acts as "totally unjustified" and the proof is ample to show "an element of wilfulness" necessary to support treble damages. *Blake v. Grant*, 65 Wash.2d 410, 412, 397 P.2d 843, 844 (1964).

Rayonier next argues that the trial court erred in its award of damages in that it allowed Polson recovery in the full amount of the injury without making proper allowance for Jackson's joint venture interest.

The joint venture agreement in effect at the time of the trespass and which defined the interests of the parties between themselves contained this provision:

"It is the purpose of the parties that Polson shall be fully reimbursed for all advances out of the [**27] first proceeds of the investment held pursuant to this agreement, including, without limitation, rents, royalties and any sums received from the sale of any tract or any interest therein. After Polson shall have been fully reimbursed for all advances made under this joint venture, the parties shall share in any proceeds of the investment equally."

The trial court found, and there was evidence to support the finding, that the "practices of the parties" were consistent with their express agreement and did not modify it in any material particular; there was also evidence that Jackson had embezzled moneys from the ven-

ture well in excess of the amount reflected in the judgment.¹³ The trial court thus committed no error.

13 For example, John H. Kirkwood, the attorney for Anna Jackson, Executrix, testified that "Jackson had embezzled thousands of dollars, hundreds of thousands." Moreover, in connection with an action brought by Polson against Anna Jackson, Kirkwood made the following verified statement:

"In the opinion of counsel and the executrix the ultimate result of said action, [Polson v. Anna Jackson, executrix] even after giving consideration to reductions in amounts, would be a judgment far in excess of the present assets of the estate, including the value of any possible and/or potential interest in the assets of the joint venture."

[**28] The district court included in the damages the sum of \$6,796.50, reflecting interest on the single damages from the date of trespass to the date of judgment. Rayonier attacks this allowance on the ground that the amount of liability was unliquidated and additionally that the statute on which the action was based precludes interest.

The first ground lacks merit. In *Grays Harbor County v. Bay City Lumber Co.*, 47 Wash.2d 879, 890-891, 289 P.2d 975, 981-982 (1955), an action to recover damages for the conversion of timber, the Washington court upheld an allowance of interest from the date of conversion despite a claim that the sum was unliquidated. Such an allowance, said the court, was proper even though the amount of liability could only be determined by expert or [*922] opinion evidence. We are convinced that the same rule should apply here.

However, we agree with Rayonier on its second point. The Washington statute is penal in character and must be strictly construed [*Bailey v. Hayden*, 65 Wash. 57, 117 P. 720 (1911); *Skamania Boom Co. v. Youmans*, 64 Wash. 94, 116 P. 645 (1911)]; it contains no provision for interest, but rather [**29] reads: "judgment * * * shall be given for treble the amount of damages * * *." ¹⁴ The general rule is that the relief expressly provided in such statutes is exclusive and cannot be extended by implication. 22 *Am. Jur.2d, Damages* §§ 267-268 (1965); *Smith v. Morgan*, 73 Wis. 375, 41 N.W. 532 (1889). "The statutory action is cumulative to the common law remedy, or perhaps rather an optional or alternative remedy;

for a resort to either would be a bar to the other." *Hughes v. Stevens*, 36 Pa. 320, 324 (1860); *Hall v. Pennsylvania Ry. Co.*, 257 Pa. 54, 69, 100 A. 1035, 1040 (1917); *Bill v. Gattavara*, 34 Wash.2d 645, 209 P.2d 457 (1949). The statute provides a "statutory measure of damages" and therefore by bringing the action under the statute "the plaintiffs have declared for double or treble value of the trees as their measure of damages, instead of single value with interest." *McCloskey v. Powell*, 138 Pa. 383, 398, 21 A. 148, 150 (1891). Although the Washington Supreme Court has never held that the statute precludes interest, it has recognized the rule, for in *Blake v. Grant*, 65 Wash.2d 410, 413, 397 P.2d 843, 844-845 (1964) [**30] it said:

"In the instant case, the trial court allowed interest from the date of conversion upon the punitive two-thirds portion of the award as well as the compensatory one-third part. It is recognized that the Grays Harbor [*County v. Bay City Lumber Co.*, 47 Wash.2d 879, 289 P.2d 975 (1955)] case was not an action for treble damages; that our statutory action for treble damages is in the nature of a penalty [citations]; and that interest is generally disallowed on punitive damages. 15 Am.Jur., Damages § 299, p. 742." ¹⁵

14 The Washington Supreme Court, on a number of occasions, has interpreted what was meant by "damages" in the treble damage statute. The court concluded that damages should be limited strictly to the "injuries cognizable by the statute" which include injury "to growing trees, timber and shrubs or to the land itself." *Guay v. Washington Natural Gas Co.*, 62 Wash.2d 473, 477-478, 383 P.2d 296, 299 (1963).

15 The passage in American Jurisprudence referred to flatly states: "Interest is not recoverable in statutory actions for double or treble damages." See also 22 Am.Jur.2d Damages §§ 179, 267 (1965); Restatement of Torts § 913, comment d at 591 (1939).

[**31] Rayonier's final point concerns the district court's findings of fact and conclusions of law, the common criticism being that they were so summary that "it is impossible to determine the basis of [the court's] decision on each of the affirmative defenses or whether he even ruled on them." See *Fed.R.Civ.P.* 52(a).

The findings do not appear in a single instrument; rather they are collated by a formal three page document entitled "Findings of Fact and Conclusions," which makes reference to various other documents and matters in the record including admitted facts, non-contested facts and lengthy transcripts of several oral opinions rendered by the court. ¹⁶

16 Courts have allowed incorporation by reference in the making of findings. E.g., *Swars v. Council of City of Vallejo*, 33 Cal.2d 867, 872, 206 P.2d 355, 358 (1949). We have frowned on such "shorthand" methods, but have held that they do not necessarily constitute reversible error. *Nuelsen v. Sorensen*, 293 F.2d 454, 459-460 (9th Cir. 1961).

[**32] In one of the documents the court stated:

"Each of the several defenses has been carefully considered in the light [*923] of the facts I find shown by a preponderance of the evidence I considered credible, and, of course, in view of the controlling authorities, in my opinion, the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum I must find, because I sincerely believe it to be correct, that there is not a preponderance of the evidence to sustain any of the affirmative defenses."

Besides this general conclusion the district court made specific findings on a number of important facts, such as the time at which Polson acquired full knowledge of all material facts, and went through a careful analysis of the credibility of the witnesses.

Although it might be helpful to the appellate court to have more comprehensive findings than in the present case [*Townsend v. Benavente*, 339 F.2d 421, 422 (9th Cir. 1964); *Darter v. Greenville Community Hotel Corporation*, 301 F.2d 70, 75-77 (4th Cir. 1962)], courts have consistently held that:

"the federal rule relating [**33] to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. [Citation] Nor is it necessary that the trial court make findings asserting the negative of each issue

of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence."

Carr v. Yokohama Specie Bank, Limited, 200 F.2d 251, 255 (9th Cir. 1952); *Manning v. Jones*, 349 F.2d 992, 995-996 (8th Cir. 1965).

In the present case we believe that the findings show that the trial court both considered and ruled on each of the affirmative defenses; we are able to determine the basis of the court's decision on each; therefore, we conclude that the findings were sufficient.

The judgment is modified by deducting the sum of \$6,796.50, [**34] which we have held was erroneously allowed as interest. As so modified, the judgment is affirmed. Costs to appellee.

NO. 16



MARCIA RHODES & others¹ vs. AIG DOMESTIC CLAIMS, INC., & others.²

1 Harold Rhodes and Rebecca Rhodes.

2 National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and Zurich American Insurance Company.

SJC-10911

SUPREME JUDICIAL COURT OF MASSACHUSETTS

461 Mass. 486; 961 N.E.2d 1067; 2012 Mass. LEXIS 28

October 6, 2011, Argued
February 10, 2012, Decided

PRIOR HISTORY: [***1]

Suffolk. Civil action commenced in the Superior Court Department on April 7, 2005. The case was heard by Ralph D. Gants, J. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Rhodes v. AIG Domestic Claims, Inc., 78 Mass. App. Ct. 299, 937 N.E.2d 471, 2010 Mass. App. LEXIS 1507 (2010)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff family filed suit against defendant insurers under *Mass. Gen. Laws ch. 93A, § 9*, and *ch. 176D, § 3(9)(f)*, for failing to effect a prompt, fair, and equitable settlement. The trial court held that primary insurer was not liable, but the excess insurer was liable for postverdict unfair settlement practices. The Appeals Court (Massachusetts) awarded loss of use damages for both preverdict and postverdict violations. The family appealed.

OVERVIEW: The injured family member was rendered a paraplegic when a tractor trailer hit the back end of her car. The family secured a judgment against the truck driver, his employer, and the company to which the driver was assigned by his employer. The family had made settlement demands on the primary and excess insurers of the company to which the driver was assigned before the tort trial, but no settlement was forthcoming. A settlement was reached over eight months after the verdict and while the defendants' appeals were pending.

While the primary insurer did not violate chs. 93A and 176D, the excess insurer's claims administrator engaged in wilful and knowing statutory violations. The damages the family was entitled to recover under *ch. 93A, § 9*, on account of the excess insurers' postjudgment violation of *ch. 93A, § 2* and *ch. 176D, § 3(9)(f)*, had to be based on the underlying judgment in the tort action, and not the loss of use of the sum ultimately included in the excess insurer's late-tendered settlement offer months after the jury's verdicts. Accordingly, a determination of whether the excess insurer's preverdict statutory violations caused injury was unnecessary.

OUTCOME: The court affirmed the judgment in the primary insurer's favor. It upheld the finding of liability against the excess insurer, but remanded the matter to the trial court for a redetermination of damages.

HEADNOTES

Insurance, Settlement of claim, Unfair act or practice. Consumer Protection Act, Insurance, Damages, Unfair or deceptive act. Statute, Construction. Damages, Consumer protection case, Punitive.

COUNSEL: Margaret M. Pinkham & M. Frederick Pritzker (Daniel J. Brown with them) for the plaintiffs.

John P. Ryan (Anthony R. Zelle with him) for AIG Domestic Claims, Inc., & another.

Linda L. Morkan, of Connecticut (Gregory P. Varga with her) for Zurich American Insurance Company.

Michael F. Aylward & Richard R. Eurich, for American Insurance Association, amicus curiae, submitted a brief.

JUDGES: Present: Ireland, C.J., Spina, Cordy, & Botsford, JJ.

OPINION BY: BOTSFORD

OPINION

[*487] [**1070] BOTSFORD, J. The issues in this appeal relate to insurance claims settlement practices of a primary and an excess insurance carrier. Marcia Rhodes³ received catastrophic injuries including permanent paraplegia when a tractor trailer hit the rear end of her car in January of 2002. She; her husband, Harold; and her daughter, Rebecca (collectively, plaintiffs or family) brought a tort action against, among others, the truck driver, his employer, and the company to which he was assigned by his employer, seeking damages for [***2] Marcia's injuries and loss of consortium on the part of Harold and Rebecca. At trial, which took place in September of 2004, the plaintiffs secured a judgment of approximately \$11.3 million. The plaintiffs had made settlement demands on the primary and excess insurers of the company to whom the truck driver was assigned before the tort trial, but no settlement was forthcoming. Eight and one-half months after the jury's verdicts and while the defendants' appeals were pending, the insurers and the plaintiffs settled the tort action, and the appeals were withdrawn.

3 For ease of reference we refer to the family members in this case by their first names.

Before the settlement was reached in the tort action, the plaintiffs brought the present action against the two insurers under *G. L. c. 93A*, § 9, and *G. L. c. 176D*, § 3 (9) (f), for failing to effect a prompt, fair, and equitable settlement of the plaintiffs' claims. Following a lengthy bench trial, a judge in the Superior Court determined that the primary insurer, Zurich American Insurance Company (Zurich), was not liable on the plaintiffs' claims of unfair settlement practices, but that the excess insurer, National Union Fire Insurance [***3] Company of Pittsburgh, Pennsylvania (National Union), and more particularly [*488] its claims administrator, the defendant AIG Domestic Claims, Inc. (AIGDC),⁴ had engaged in wilful and knowing violations of *G. L. c. 93A* (c. 93A), and *G. L. c. 176D* (c. 176D), both before the trial in the tort action and after judgment entered in it. The judge, however, concluded that the plaintiffs could not recover for preverdict violations because they had not proved that the unfair or deceptive acts complained of before trial had caused them any "actual damages," or

injury. In connection with the postjudgment violation, the judge awarded damages -- doubled because of the violation's wilful and knowing character -- based on the plaintiffs' loss of use of the funds that they accepted in postjudgment settlement of their claims (i.e., interest on those funds).

4 Because AIG Domestic Claims, Inc. (AIGDC), handled all the administration of the plaintiffs' claims on behalf of the excess insurer National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union), we refer to these two defendants collectively as AIGDC. Both AIGDC and National Union are liable for AIGDC's violations of *G. L. c. 93A* (c. [***4] 93A).

The plaintiffs appealed to the Appeals Court. See [**1071] *Rhodes v. AIG Domestic Claims, Inc.*, 78 Mass. App. Ct. 299, 937 N.E.2d 471 (2010). Disagreeing with the trial judge, a divided panel of that court concluded that with respect to AIGDC's preverdict conduct in the tort action, "the causal link between AIGDC's unfair settlement practices and injury to the plaintiffs was sufficiently established" because AIGDC's conduct deprived the plaintiffs of "the opportunity to engage in a timely settlement process," "compound[ed] their frustrations and fears," and "exacerbate[ed] their losses." *Id. at 309, 310, 311*. A majority of the panel further determined that the measure of damages for the preverdict violation should be the loss of use of the funds AIGDC had offered in settlement before the trial, reasoning that permitting insurers to limit their c. 93A and c. 176D liability to loss of use by making a reasonable, but tardy, offer was in keeping with c. 176D's purpose of encouraging out-of-court settlements of insurance claims.⁵ *Id. at 312*. The Appeals Court also awarded loss of use damages for AIGDC's postjudgment violation. *Id. at 315*.

5 Justice Berry wrote separately concluding that loss of use was not necessarily [***5] the appropriate measure of damages where, as here, the insurers' proffered settlement was not accepted, and that, in any event, AIGDC's last pretrial settlement offer was neither fair nor reasonable. In her view, AIGDC could be liable for damages up to the amount of the jury verdicts in the tort action. See *Rhodes v. AIG Domestic Claims, Inc.*, 78 Mass. App. Ct. 299, 317, 937 N.E.2d 471 (2010) (Berry, J., concurring in part and dissenting in part).

[*489] The case is before us on the plaintiffs' application for further appellate review. We conclude that the damages the plaintiffs are entitled to recover under *c. 93A*, § 9, on account of the defendants' postjudgment

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violation of *c. 93A, § 2*, and *c. 176D, § 3 (9) (f)*, must be based on the underlying judgment in the plaintiffs' tort action, and not the loss of use of the sum ultimately included in AIGDC's late-tendered settlement offer months after the jury's verdicts. This conclusion makes it unnecessary to determine whether AIGDC's wilful and knowing violation of the applicable statutes before the verdicts in the tort case caused injury to the plaintiffs, because even if, as they argue, the plaintiffs did establish the requisite causal link between AIGDC's preverdict [***6] violations and injury and thereby are entitled to a multiple of the underlying tort judgment as damages, the plaintiffs may not recover that amount twice. We affirm the judge's determination that Zurich did not violate *c. 93A* and *c. 176D*, and is not liable to the plaintiffs.⁶

6 We acknowledge the amicus brief of the American Insurance Association.

1. Background.⁷ a. The accident. [***7] There has never been a dispute that Marcia's accident was caused by the negligence of the truck driver, with no contributory negligence on her part. The force of the eighteen-wheel truck's crash into the back of Marcia's car fractured her spinal cord, rendering her paraplegic, and broke several of her ribs. Marcia was hospitalized from the day of the accident, January 9, 2002, until April 16, 2002, after undergoing spinal fusion surgery and two months of rehabilitation. Even after returning home, she could not move from her wheelchair to her bed or the toilet on her own. In May, 2002, she had emergency surgery to remove her gall bladder due to gangrene and spent another three weeks recovering in a hospital. In December, 2002, Marcia developed pressure sores and was [**1072] bedridden for ten months, until October, 2003.

7 The facts recited are primarily taken from the judge's findings of fact in the *c. 93A* action, supplemented by references to undisputed testimony of certain witnesses at trial.

b. The tort action. Driver Logistic Services (DLS) had assigned Carlo Zalewski, its employee, to drive the truck involved in the accident for GAF Building Corp. (GAF). The truck was [*490] owned by Penske Truck [***8] Leasing Company (Penske) and leased to GAF. GAF held a \$2 million primary automobile insurance policy with Zurich and a \$50 million excess umbrella policy with National Union. AIGDC was National Union's claims administrator and managed the plaintiffs' excess insurance claim.

After investigation, on April 8, 2002, GAF's third-party claims administrator, Crawford & Company (Crawford), informed GAF, Zurich, and AIGDC in writing that Zalewski clearly was liable for Marcia's injuries and that his liability could be imputed to GAF. By July 3,

2002, GAF had determined that its policies with Zurich and National Union covered GAF, Zalewski, DLS, and Penske (collectively, GAF-insured defendants) for the accident.

On July 12, 2002, the plaintiffs filed their negligence action against the GAF-insured defendants in the Superior Court. On September 25, in a facsimile sent directly to David McIntosh, a claims director at Zurich, Crawford estimated the value of the case to be between \$5 million and \$10 million.⁸ On November 21, Zalewski admitted to facts sufficient to support guilt on a criminal charge of operating negligently to endanger. Thereafter, on July 22, 2003, counsel for the plaintiffs made [***9] an oral settlement demand of \$18.5 million. Approximately three weeks later, on August 13, the plaintiffs submitted a written settlement demand of \$16.5 million.⁹

8 The Crawford & Company (Crawford) adjuster who made this estimate was succeeded by another adjuster who, in May of 2003, made the same estimate.

9 The demand included incurred medical expenses of \$413,977.68, present value of future medical costs of \$2,027,078, loss of household services of \$292,379, and out-of-pocket expenses of \$83,984.74. This offer was lower than the July, 2003, demand because the calculation of incurred medical expenses showed that they were lower than initially anticipated or projected.

On December 19, 2003, the claims director for Zurich asked for approval before the end of the year to tender Zurich's \$2 million policy limits to AIGDC as excess insurer, noting in her report that the probability of a plaintiffs' verdict was one hundred per cent, and there was no possibility of a comparative negligence reduction. After receiving authorization, the claims director orally tendered the limits to AIGDC in a telephone call on January 23, 2004. The AIGDC representative responded that he needed the tender in writing [***10] (despite knowing as early as [*491] November of 2003 that the tender would be made), and the tender of the Zurich policy was made formally in writing on March 29, 2004. No information was communicated to the family regarding this tender. Zurich continued to pay defense costs for the litigation¹⁰ because AIGDC claimed that it had no defense obligation under its excess policy, but Zurich reserved the right to recover the defense costs from AIGDC. Nonetheless, AIGDC participated in the defense and hired the law firm of Campbell & Campbell in December, 2003, to serve as cocounsel for the GAF-insured defendants. In June, 2004, Campbell & Campbell took over as lead counsel.

10 Zurich hired the law firm of Nixon Peabody LLP to represent the GAF-insured defendants.

On March 4, 2004, several GAF representatives met with their attorneys and a [**1073] representative of AIGDC to discuss the results of jury verdict and settlement research. Among comparable automobile accident cases, mostly in Massachusetts, the average settlement was over \$6.6 million, and the average verdict was over \$9.6 million. Sometime between March 29, 2004, and the pretrial conference in the negligence action on April 1, 2004, the GAF-insured [***11] defendants made their first settlement offer to the family -- Zurich's \$2 million policy limits to settle the entire case. The plaintiffs' attorney thought the offer was wholly inadequate, and the family rejected it without making a counteroffer. Nevertheless, the plaintiffs agreed in mid-April to mediate the case. AIGDC did not want to mediate at that time, stating that it needed further discovery although discovery had closed more than six months before. The judge, however, did not accept AIGDC's proffered justification, finding:

"The fact of the matter is that AIGDC[] did not delay its settlement offer in order to conduct the [independent medical evaluation] or to depose [Marcia] or to obtain [her] psychological records; it delayed its settlement offer because it did not want to make any offer until mediation and it wanted, for strategic purposes, to wait until nearly the eve of trial to mediate the case."

Because of AIGDC's wish for delay, at its direction, the mediation did not occur until August 11, 2004, less than one month [*492] before the September 7 trial date that had been set the previous April.

In connection with the mediation, AIGDC authorized its representative to make an offer [***12] of up to \$3.75 million to settle the case on behalf of the GAF-insured defendants¹¹; AIGDC expected there would be an additional \$1 million coming from the insurer of Professional Tree Service.¹² Once at the mediation, the family proffered an initial demand of \$15.5 million, plus payment of Marcia's health insurance premiums for the rest of her life. The AIGDC representative responded with an offer of \$2.75 million. The family countered with a demand of \$15 million, and AIGDC then offered \$3.5 million. During the mediation, the family separately reached a settlement with Professional Tree Service for \$550,000. Despite learning that this settlement was less than expected, the AIGDC representative did not seek authorization to offer more in settlement on behalf of the remaining defendants. In fact, he never even increased AIGDC's

offer to the \$3.75 million that he had been authorized to offer before the mediation began. About one hour after making the \$3.5 million offer, the defendants left the mediation.

11 This figure included the \$2 million Zurich policy plus \$1.75 million from the AIGDC excess policy.

12 Professional Tree Service was the company working near the accident site. It held [***13] a \$1 million insurance policy.

Between the mediation and the beginning of trial on September 7, 2004, there were no further settlement negotiations, and no further offers from any of the tort defendants. The GAF-insured defendants other than Penske stipulated to their liability just prior to trial, and the parties stipulated to the dismissal of all claims against Penske during trial. Accordingly, the only issue for the jury was determination of the amount of damages. At the close of the evidence, concluding the trial had gone better for the plaintiffs than expected, the AIGDC representative made a settlement offer of \$6 million, which included the \$2 million Zurich policy but not the Professional Tree Service settlement of \$550,000. The plaintiffs' counsel did not communicate [**1074] the offer to the family, thus effectively rejecting it on their behalf. The jury returned verdicts for the plaintiffs on September 15, 2004, awarding damages totaling \$9.412 million. The total amount [*493] included \$7.412 million for Marcia, \$1.5 million for Harold in loss of consortium damages, and \$500,000 for Rebecca in consortium damages. After deducting the \$550,000 settlement with Professional Tree Service and adding [***14] statutory interest, the judgment that entered against the remaining GAF-insured defendants on September 28, 2004, was approximately \$11.3 million. On October 18, these defendants moved for a new trial or, in the alternative, remittitur; they also filed notices of appeal on November 10. The motions for a new trial or remittitur were denied on November 17.

c. The c. 93A action and settlement of the tort action. On November 19, 2004, the plaintiffs sent demand letters to Zurich and AIGDC pursuant to *G. L. c. 93A, § 9*, alleging that they had failed to effectuate a prompt and equitable settlement of the family's accident claims in violation of *G. L. c. 176D, § 3 (9) (f)*. AIGDC responded to the demand letter on December 17, 2004, offering \$7 million (including Zurich's \$2 million) to settle the underlying tort suit as well as the plaintiffs' c. 93A claims. Zurich responded on December 22, 2004, by paying the family \$2,322,995.75 without receiving any release of the c. 93A claim against it. The family then filed the present c. 93A action against AIGDC and Zurich on April 7, 2005. AIGDC and the family settled the negligence ac-

tion for \$8.965 million on June 2, 2005. Pursuant to the settlement [***15] agreement, the remaining GAF-insured defendants dropped their appeals from the judgment in that action, but the plaintiffs retained their c. 93A claims against AIGDC and Zurich.

At the subsequent bench trial of the c. 93A action in 2007, each side presented the testimony of an expert witness regarding the promptness and reasonableness of the settlement offers made by the insurers. As stated, the judge found that Zurich did not violate *c. 176D, § 3 (9) (f)*, or *c. 93A*, but that AIGDC had violated its duty under *c. 176D, § 3 (9) (f)* (and derivatively *c. 93A*), to effectuate a prompt, fair, and equitable settlement before trial of the plaintiffs' tort action and again following judgment in that case. In particular, with respect to the pretrial violation, the judge found that (1) AIGDC wilfully and knowingly committed a breach of its duty to make a prompt settlement offer once liability (including damages) was reasonably clear; [*494] (2) AIGDC should have made a fair, reasonable offer by May 1, 2004; but (3) AIGDC's failure to do so did not cause the family to suffer any actual damages because, in his view, the evidence indicated the family would not have accepted even a timely reasonable offer and, therefore, [***16] would have proceeded to trial in any event. As for the postjudgment violation, the judge determined that AIGDC wilfully and knowingly violated its duty to effectuate a prompt and fair settlement after the jury verdict in the tort case, characterizing AIGDC's December, 2004, postjudgment settlement offer of \$7 million in response to the plaintiffs' c. 93A demand letter as "not only unreasonable, but insulting." On this postjudgment claim, he awarded loss of use damages of \$448,250, calculated as the lost interest on the ultimate \$8.965 million settlement between the date the negligence case should have settled in January, 2005, and the date it actually did settle, in June of 2005.¹³

13 The judge calculated the interest at the postjudgment rate of one per cent per month. He multiplied the amount for which the plaintiffs ultimately settled, \$8.965 million, by .05 to arrive at \$448,250. The judge then doubled this amount because of the wilful and knowing character of the violation. AIGDC also was required to pay the family's reasonable attorney's fees and costs, as provided for by *G. L. c. 93A, § 9*. This fee award is not at issue in this appeal.

[**1075] 2. Discussion. The statutory framework governing [***17] the plaintiffs' claims in this case is well known. An insurance company commits an unfair claim settlement practice if it "[f]ail[s] to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." *G. L. c. 176D, § 3*

(9) (f). "[A]ny person whose rights are affected by another person violating the provisions of [*G. L. c. 176D, § 3 (9) (f)*]," is entitled to bring an action to recover for the violation under *G. L. c. 93A, § 9*.¹⁴ If there is a finding in such an action that [*495] the insurer has failed to effectuate a prompt, fair, and equitable settlement causing injury, the plaintiff is entitled to the greater of actual damages or statutory damages of twenty-five dollars. *G. L. c. 93A, § 9 (3)*. However, if the judge finds the insurer's action was wilful or knowing (or, as here, both), the judge must grant double or treble damages. *Id.*

14 *General Laws c. 93A, § 9 (1)*, provides:

"Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any [***18] person whose rights are affected by another person violating the provisions of *clause (9) of [G. L. c. 176D, § 3]*, may bring an action in the superior court . . . whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper."

In this appeal, the plaintiffs challenge the judge's determination that AIGDC's unfair or deceptive conduct before trial did not cause them injury, and his calculation of damages for both the pretrial and posttrial conduct.¹⁵ We consider the two claims separately.

15 AIGDC does not contest here the judge's findings that its conduct before and after the entry of judgment in the tort action constituted knowing and wilful violations of *c. 176D, § 3 (9) (f)*, and *c. 93A, § 9*. AIGDC's lack of contest is reasonable, because the trial record provides ample support for the judge's findings.

a. AIGDC's pretrial conduct. "We review a judge's findings of fact under the clearly erroneous standard and his conclusions of law *de novo*." *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503, 952 N.E.2d 908 (2011). Several decisions of this court have established

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[***19] that an insurer has the burden to prove that its settlement offer was reasonable, and a plaintiff need not prove that she would have accepted a reasonable offer, had one been made. "An 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. . . . Accordingly, quantifying the damages . . . does not turn on whether the plaintiff can show that she would have taken advantage of an earlier settlement opportunity." (Citation omitted.) *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 567, 750 N.E.2d 943 (2001) (Hopkins). See *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 662-663, 790 N.E.2d 653 (2003) (Bobick) ("The judge's . . . decision was based, in part, on the plaintiff's failure to demonstrate that he would have been willing to accept a reasonable settlement offer at any time before trial. This is incorrect").

The judge, however, concluded that this court's decision in *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 840 N.E.2d 526 (2006) (Hershenow), [**1076] overturned this principle. The judge stated:

"[S]ince there can be no adverse consequence or loss [*496] from the failure of an insurer to make a prompt and reasonable settlement offer if [***20] the plaintiff would have rejected that offer, Hershenow, although not an insurance case, must stand for the proposition that a plaintiff, to prevail on a Chapter 93A/Chapter 176D claim, must prove not only that the insurer failed to make a prompt or reasonable settlement offer but also that, if it had, the plaintiff would have accepted that offer and settled the actual or threatened litigation."

We disagree that *Hershenow* changed our c. 93A jurisprudence generally, or the legal framework governing claims of unfair or deceptive claims settlement practices in particular.

Hershenow reaffirms the established principle that to recover under c. 93A, § 9, a plaintiff must prove causation -- that is, the plaintiff is required to prove that the defendant's unfair or deceptive act caused an adverse consequence or loss.¹⁶ *Id.* at 798, 800. This is far from a new or even amended interpretation of c. 93A. See, e.g., *R.W. Granger & Sons v. J & S Insulation, Inc.*, 435 Mass. 66, 80-81, 754 N.E.2d 668 (2001) (Granger), and cases cited ("We have interpreted the statute, before and after the 1989 amendment, to require a plaintiff who seeks damages under *G. L. c. 93A* to establish a causal

link between the insurer's wrongful [***21] conduct and the loss a plaintiff claims to have suffered"); *Hopkins*, 434 Mass. at 567 n.17 (referring to "the obvious rule that, in order to recover actual damages under *G. L. c. 93A*, § 9, there must be a causal relationship between the alleged unfair act and the claimed loss"). See also *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 630-631, 888 N.E.2d 879 (2008) (discussing and factually distinguishing Hershenow because latter was case where no harm was caused).

16 In Hershenow, two consumers sued the defendants, rental car companies, alleging that their form contracts contained language contrary to the requirements of *G. L. c. 90*, § 32E 1/2; the challenged language purported to reduce the protections available to the plaintiffs under the collision damage waiver in the companies' rental contracts in alleged violation of this statute. *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 445 Mass. 790, 792-793, 840 N.E.2d 526 (2006). Because none of the automobiles rented by the plaintiffs suffered collision damage during any of the plaintiffs' rental periods, however, the court held that the defendants' deceptive acts did not cause injury to the plaintiffs and therefore summary judgment was properly entered for the defendants. [***22] *Id.* at 791, 792.

[*497] As the judge noted, Hershenow is not an insurance case and does not deal with the interaction between c. 93A and c. 176D, § 3 (9) (f). Nothing in Hershenow supports the conclusion that our decision in that case was intended to change the law and place a new burden on plaintiffs to prove that they would have accepted a prompt, reasonable settlement offer, had the insurer made such an offer. Rather, as stated in Hopkins and Bobick, it has been and remains the rule that the plaintiffs need only prove that they suffered a loss, or an adverse consequence, due to the insurer's failure to make a timely, reasonable offer; the plaintiffs need not speculate about what they would have done with a hypothetical offer that the insurers might have, but in fact did not, make on a timely basis. See *Bobick*, 439 Mass. at 662-663; *Hopkins*, 434 Mass. at 567.

The Appeals Court applied the principles stated in the Hopkins and Bobick cases in its analysis of the facts found by [**1077] the judge, and the Appeals Court's conclusion that the plaintiffs did establish the requisite causal link between AIGDC's delayed settlement offer and actual injury to them is certainly reasonable. Ultimately, though, [***23] it is unnecessary for us to resolve the causation issue because, as we next explain, the plaintiffs are entitled to recover multiple damages based on the underlying tort judgment for AIGDC's postjudg-

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ment violation of *c. 176D, § 3 (9) (f)*, and *c. 93A*.¹⁷ The plaintiffs correctly do not suggest that they are entitled to recover twice for AIGDC's continuing failure to effectuate a prompt and reasonable settlement.

17 Likewise, we need not decide whether, as the plaintiffs contend, a number of the judge's significant factual findings are clearly erroneous. In particular, the plaintiffs challenge the finding that the family would not have accepted an offer of less than \$8 million on May 1, 2004.

b. Measure of damages. We turn to the appropriate measure of damages to be awarded to the plaintiffs under *c. 93A*, an issue of law that we review *de novo*. See *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. at 503. Before 1989, several decisions of this court and the Appeals Court held that the measure of damages for an insurer's failure to make a prompt, fair, and equitable settlement offer were the damages directly caused by the insurer's conduct -- typically, loss of the use of such funds from [***24] the time when the claim should have been paid to the time [*498] that a settlement or judgment was paid -- and not the total amount owed to the claimant under the insurance policy. See, e.g., *Bertassi v. Allstate Ins. Co.*, 402 Mass. 366, 522 N.E.2d 949 (1988) (Bertassi); *Wallace v. American Mfrs. Mut. Ins. Co.*, 22 Mass. App. Ct. 938, 494 N.E.2d 35 (1986) (Wallace); *Trempe v. Aetna Cas. & Sur. Co.*, 20 Mass. App. Ct. 448, 480 N.E.2d 670 (1985) (Trempe). If the insurer's conduct was wilful or knowing, loss of use damages were doubled or trebled.

In 1989, the Legislature amended *c. 93A, §§ 9 and 11*, with respect to the calculation of damages. See *St. 1989, c. 580* (1989 amendment). Of particular significance to this case, after the 1989 amendment, *c. 93A, § 9 (3)*, contains the following directive relating to multiple damages:

"[I]f the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use of employment of the act or practice was a willful or knowing violation of [*c. 93A, § 2*] For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the [***25] amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or non-existence of insurance coverage available

in payment of the claim"¹⁸ (emphasis supplied).

18 *Section 11 of c. 93A* contains identical language. The plaintiffs' claims against Zurich and AIGDC are brought only under *c. 93A, § 9*.

There is general consensus among courts and commentators that the 1989 amendment was intended to increase the potential penalties for insurers who engaged in unfair claim settlement practices, in response to the Bertassi-Wallace-Trempe line of cases. See *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 685-686, 689 N.E.2d 1347 (1998); *Clegg v. Butler*, 424 Mass. 413, 424, 676 N.E.2d 1134 (1997); [***1078] *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 653-655, 679 N.E.2d 248 (1997); *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass. App. Ct. 748, 755, 673 N.E.2d 84 (1996). See also Billings, *The Massachusetts Law of Unfair Insurance Claim Settlement Practices*, 76 Mass. L. Rev. 55, 71 (1991); Hailey, *New Incentive for Insurers to Settle Claims Reasonably and Promptly*, 34 Boston B.J. 16, 17 (1990).

[*499] Under the plain language of the 1989 amendment, if a defendant commits a wilful or knowing *c. 93A* violation that [***26] finds its roots in an event or a transaction that has given rise to a judgment in favor of the plaintiff, then the damages for the *c. 93A* violation are calculated by multiplying the amount of that judgment.¹⁹ In *Granger*, we adopted precisely this interpretation of the 1989 amendment. *Granger*, 435 Mass. at 81-82. The defendant-in-counterclaim in that case failed to make a prompt settlement offer after a jury verdict had entered in favor of the plaintiff-in-counterclaim on its underlying surety claim. This court reiterated that, as stated above, if judgment has entered, "actual damages" shall be taken to be the amount of the judgment for the purpose of bad faith multiplication." *Id.* at 81-82, quoting *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. at 685. The judge had awarded *c. 93A* damages of twice the judgment on the underlying claim, and this court affirmed the award, stating that "the judge did precisely what the language of the 1989 amendment requires." *Granger, supra* at 82.

19 The situation described in the preceding sentence of text must be differentiated from two other possible scenarios. In cases where an underlying judgment has entered, but the *c. 93A* violation gives rise to single [***27] damages only because the violation was not wilful or knowing, the 1989 amendment is inapplicable -- it only applies to damages "to be multiplied by the court."

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Accordingly, the single damages would be calculated in the same manner as they were before the 1989 amendment. See *Yeagle v. Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 653-654, 679 N.E.2d 248 (1997). Similarly, if no judgment has entered on any claim arising out of the same and underlying transaction or occurrence (for example, if the underlying case settles), it is impossible to apply the language of the 1989 amendment to a related c. 93A violation. Therefore, the c. 93A damages are to be determined in the same way that they were before the 1989 amendment, and if the violation was wilful or knowing, those actual damages are to be multiplied. See *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 685-686, 689 N.E.2d 1347 (1998); *Clegg v. Butler*, 424 Mass. 413, 424-425, 676 N.E.2d 1134 (1997).

In the present case, the judge and the Appeals Court both concluded that loss of use damages ought to form the basis of an award of multiple damages for AIGDC's postjudgment violation because such an award was in keeping with the policies behind c. 176D, § 3 (9) (f), and c. 93A. AIGDC argues [***28] that multiplying the tort judgment is improper because AIGDC's postjudgment failure to settle did not cause the underlying tort judgment. These conclusions and arguments misread both the 1989 amendment and our decision in *Granger*. In order to be [*500] awarded c. 93A damages, the plaintiffs were required to show that AIGDC's postjudgment conduct caused injury to them. We agree with the judge and the Appeals Court that AIGDC's postjudgment conduct did cause injury; at the very least, the plaintiffs did not have the use of the monetary damages the jury had awarded them in September, 2004, until the matter finally settled on June 2, 2005.²⁰ But whether the deceptive conduct caused the tort judgment is irrelevant, [**1079] for several reasons: First, nothing in the text of c. 93A, § 9, states that damages are to be calculated differently in the case of a postjudgment rather than a prejudgment failure to effectuate settlement, and it is clearly the case that if knowing or wilful prejudgment conduct causes injury, the proper measure of damages would be the underlying tort judgment. Second, c. 93A, § 9, does not require a causal relationship between the unfair practice and the underlying judgment itself; [***29] rather, the statutory causation requirement focuses on the relationship between the unfair practice and injury to the plaintiff. Moreover, there is no meaningful distinction between this case, where AIGDC failed to make a prompt settlement offer after jury verdicts entered in favor of the plaintiffs, and the *Granger* case. The damages suffered by the plaintiff-in-counterclaim in *Granger* after the verdict were loss of use of the settlement funds, just as they were here, yet this court concluded that multiple damages must be calculated based on the underlying judgment,

not on the loss of use damages.²¹ *Granger*, 435 Mass. at 82. Thus, we conclude that the language of the [*501] 1989 amendment requires that we award, as c. 93A damages, double the amount of the judgment entered in favor of the family on its underlying negligence claim against the GAF-insured defendants.²²

20 Additionally, a postjudgment refusal to settle promptly can cause the same injuries as a late pretrial settlement offer. The plaintiffs can continue to suffer the costs and frustrations of litigation, as well as the fear of financial ruin, during the appeal process.

21 AIGDC emphasizes the Appeals Court's ruling that because "litigation [***30] at the appellate level had not commenced to a significant degree at [the time of settlement] . . . the statutory purpose was served by measuring punitive damages according to loss of use." We find two flaws with that reasoning, however. First, "[w]here, as here, the statutory text is clear, '[w]e are not free simply to add language to a statute for the purpose of "interpret[ing] [the statute] according to [the Legislature's] perceived objectives.'" *Commonwealth v. Gillis*, 448 Mass. 354, 363, 861 N.E.2d 422 (2007), quoting *Commonwealth v. One 1980 Volvo Auto.*, 388 Mass. 1014, 1015-1016, 448 N.E.2d 64 (1983). Second, the court in the *Granger* case did not base its finding that the judgment must be multiplied on the length of time that the plaintiff-in-counterclaim was forced to defend the appeal. See *R.W. Granger & Sons v. J & S Insulation, Inc.*, 435 Mass. 66, 82, 754 N.E.2d 668 (2001).

22 The judge determined that double, rather than treble, damages should be awarded for AIGDC's wilful and knowing conduct.

AIGDC asserts, however, that in this case, the plaintiffs' tort judgment against the GAF-insured defendants does not arise out of the same and underlying transaction or occurrence as their c. 93A claim against AIGDC for two reasons, [***31] neither of which we find persuasive.

First, AIGDC appears to claim that a judgment can only arise "out of the same and underlying transaction or occurrence" as a c. 93A claim if the judgment is issued directly against the insurer and there is a "first party relationship" between the claimant and the insurer. While AIGDC is correct that the decisions commonly cited as providing the impetus for the 1989 amendment (*Bertassi*, *Wallace*, and *Trempe*) were all cases in which the claimant-plaintiff was suing his own insurer for unfair claims settlement practices rather than the insurer of a tortfeasor who had harmed him, the 1989 amendment makes no

distinction between first-party and third-party insurers for any purpose, including calculation of multiple damages. Had the drafters of the 1989 amendment intended to allow multiple damages to be awarded on judgments only in cases where an insured sued his own insurer, presumably they would have stated it explicitly, particularly given that c. 93A had previously been interpreted to permit third-party claims against insurers for unfair [***1080] claim settlement practices. See *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 674-675, 448 N.E.2d 357 (1983). We presume [***32] that the Legislature was aware of prior amendments to c. 93A and this court's interpretations of c. 93A when it enacted the 1989 amendment. *CFM Buckley/North, LLC v. Assessors of Greenfield*, 453 Mass. 404, 412, 902 N.E.2d 381 (2009), quoting *Condon v. Haitzma*, 325 Mass. 371, 373, 90 N.E.2d 549 (1950) ("Legislature must be presumed to have meant what the words plainly say, and it also must be presumed that the Legislature knew preexisting law and the decisions of this court").

Second, AIGDC contends that because the family's judgment [*502] on the tort claim was not obtained in the same proceeding with the c. 93A claim, that judgment does not arise out of the same and underlying transaction or occurrence and should not be the basis for an award of multiple damages.²³ See *Drywall Sys., Inc. v. ZVI Constr. Co.*, 435 Mass. 664, 668, 761 N.E.2d 482 (2002) (*Drywall*) (discussing *Clegg v. Butler*, 424 Mass. 413, 676 N.E.2d 1134 [1997] [*Clegg*], and *Bonofiglio v. Commercial Union Ins. Co.*, 411 Mass. 31, 576 N.E.2d 680 [1991], S.C., 412 Mass. 612, 591 N.E.2d 197 [1992] [*Bonofiglio*]). The *Clegg* case held that, because a settlement is not a judgment, the full amount of the settlement cannot be multiplied to determine multiple damages under the 1989 amendment. *Clegg*, *supra* at 424-425. Likewise, the *Bonofiglio* [***33] case held that an arbitrator's award, for the purposes of a judge's calculation of multiple damages in a court action brought under c. 93A, is not a judgment. *Bonofiglio*, *supra* at 37. However, in *Drywall*, we held that an arbitrator's award, for the purpose of an arbitrator's calculation of multiple damages under c. 93A in an arbitral proceeding, is the equivalent of a judgment, and therefore an arbitrator is not prohibited from awarding multiple damages on the full amount of an arbitration award, although a "court" would not be entitled to do so. *Drywall*, *supra* at 669. We conclude that the judgment against the GAF-insured defendants, which was neither a settlement nor an arbitration award, did arise out of the same transaction or occurrence as the c. 93A claim.

23 To the extent that AIGDC contends the judgment was not obtained in the same proceeding because the tort action and c. 93A action were initiated by two separate complaints -- as opposed

to amending the original tort complaint to include a c. 93A claim -- we dismiss the argument as one of form over substance.

AIGDC further contends that multiplying the amount of the judgment in the tort action creates a "grossly excessive" award of punitive [***34] damages that violates AIGDC's right to due process under the *Fourteenth Amendment to the United States Constitution*. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003) (*Campbell*). In AIGDC's view, in order to determine whether the award was grossly excessive, we must apply the "[t]hree guideposts" outlined by the United States Supreme Court in *Campbell* and its predecessor, [*503] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-585, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (*Gore*); AIGDC also relies on *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (*Baker*), citing *Campbell*, *supra* at 425, and *Gore*, *supra* at 574-575 ("our cases have announced due process standards that every award must pass").

[**1081] The Supreme Court's chief concern in cases like *Campbell*, *Gore*, and *Baker* was that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts," which can lead to arbitrary and unconstitutional awards of punitive damages. *Campbell*, 538 U.S. at 417. It seems unlikely that in using the words "every award" in *Baker*, 554 U.S. at 501, the Court intended to expand [***35] its prior holdings to require application of the guideposts to the review of punitive damages awarded, as here, by a judge pursuant to a specific statutory formula, rather than by a jury. Under c. 93A, the award of punitive damages is significantly circumscribed. The judge may only award them if the defendant acted wilfully or knowingly, and the award must be between two and three times compensatory damages included in a judgment on any claim arising from the same and underlying transaction or occurrence. *G. L. c. 93A, § 9 (3)*.

Nonetheless, there is no need to decide whether the *Campbell-Gore* guideposts govern multiple awards of damages under c. 93A because if we were to assume that the guideposts do apply, this award would pass constitutional muster. First, AIGDC's conduct was sufficiently reprehensible to merit the award of punitive damages. See *Campbell*, 538 U.S. at 419. The target of the conduct, the Rhodes family, was financially vulnerable because they had used much of their savings to pay for Marcia's medical expenses.²⁴ Of significance as well, the conduct involved repeated actions over several years; AIGDC failed to effectuate prompt settlement both before and after the judgment. [***36] Finally, the viola-

tion resulted from conduct that was both wilful and knowing.

24 When AIGDC filed notices of appeal after the jury verdicts, Harold testified that he "realized that if they can delay this for two more years, we would be in dire financial straits. And I was just absolutely afraid that we wouldn't be able to withstand two more years and then we would just have to take whatever they offered."

Second, the ratio between compensatory and punitive damages is not excessive. The punitive award is two times the amount [*504] of the underlying negligence judgment, which was a compensatory award for the combination of Marcia's injuries, including pain and suffering, and Harold's and Rebecca's loss of consortium. AIGDC argues that calculating damages based on the negligence judgment is inappropriate because there is "no relationship whatsoever with the actual compensatory damages caused by the unfair or deceptive trade practice." We disagree; the unfair settlement practice is intimately bound up with the underlying negligence judgment. In a case like this one, where a plaintiff suffers catastrophic injuries, the failure to effectuate a prompt settlement is particularly harmful to the claimant [***37] because high unpaid medical expenses make the prompt receipt of insurance funds extremely important. Insurers also have a greater incentive to delay settlement as long as possible, hoping to force the claimant to accept a lower offer. The statute puts insurers on notice that if they wilfully fail to effectuate settlement on a case with high potential for a large judgment at trial, they are liable for up to treble damages based on that judgment amount. If AIGDC had not acted wilfully and unreasonably in refusing to settle the case, it could have avoided the imposition of any punitive damages on the judgment amount.

The third guidepost is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *Campbell*, 538 U.S. at 428, quoting [**1082] *Gore*, 517 U.S. at 575. A \$1,000 civil penalty may be imposed for violating G. L. c. 176D, see G. L. c. 176D, § 7, and a \$5,000 civil penalty may be imposed for violating c. 93A, see G. L. c. 93A, § 4. But because c. 93A was intended to be enforced by private parties, see *Ameripride Linen & Apparel Servs., Inc. v. Eat Well, Inc.*, 65 Mass. App. Ct. 63, 69-70, 836 N.E.2d 1116 (2005), and only rarely are civil penalties [***38] sought by the Attorney General, this disparity is not enough, on its own, to find that the award of punitive damages is excessive. We conclude that the award of punitive damages is not so "grossly excessive" as to violate AIGDC's due process protections.

As a final issue, the plaintiffs assert that under c. 93A, not only are they entitled to receive punitive damages calculated as a multiple of the negligence judgment, but they are also entitled to compensatory damages for loss of use of funds and the frustrations [*505] of litigation, including emotional distress. This is incorrect. The statute provides in pertinent part: "[R]ecoverly shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of [G. L. c. 93A, § 2]" (emphasis added). G. L. c. 93A, § 9 (3). A prevailing plaintiff does not receive both actual damages and multiple damages -- it is one or the other. See *Granger*, 435 Mass. at 80-82 (affirming award of double damages and no compensatory damages). Because the judge found that AIGDC's conduct was wilful [***39] and knowing, the plaintiffs are entitled to an award of multiple damages only.

c. Zurich's conduct. The judge found that Zurich did not violate its duty under § 3 (9) (f) to effectuate a prompt, fair, and equitable settlement with the plaintiffs once liability and damages had become reasonably clear. He found that Zurich's determination of liability and damages was not completed until November 19, 2003, and that "Zurich acted with the promptness required under [§ 3 (9) (f)] when it provided AIGDC with its verbal tender of policy limits on January 23, 2004." As of January 23, AIGDC had taken over the obligation to effectuate a prompt, fair, and equitable settlement offer with the plaintiffs.

The plaintiffs challenge the judge's finding, arguing that Zurich improperly delayed its investigation of the family's claim in violation of Zurich's own best practices policy, and that liability and damages, at least up to the policy limits, would have been reasonably clear by late 2002, had Zurich taken the proper steps to investigate. Thus, the plaintiffs state, it should not have taken Zurich until March of 2004 to tender verbally its policy limits to AIGDC.

Our review of the record indicates that [***40] the trial judge's findings on the issues when liability and damages were reasonably clear, and whether Zurich tendered its policy limits promptly, were not clearly erroneous; there is no basis to disturb them. The record also supports the judge's determination that Zurich, the primary insurer, satisfied its duty to effectuate settlement by tendering the policy limits to AIGDC, where it was clear that the case would not settle for an amount within the primary policy [*506] limits, necessitating the involvement of the excess insurer. We affirm the judgment in Zurich's favor.

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3. Conclusion. We recognize that \$22 million in c. 93A damages is an enormous sum, but the language and history of the 1989 amendment to c. 93A leave no option but to calculate the award of double damages against AIGDC based on the amount [**1083] of the underlying tort judgment. The Legislature may wish to consider expanding the range of permissible punitive damages to be awarded for knowing or wilful violations of the statute to include more than single, but less than double,

damages; or developing a special measure of punitive damages to be applied in unfair claim settlement practice cases brought under *c. 176D, § 3 (9)*, and c. [***41] 93A that is different from the measure used in other types of c. 93A actions. We remand this case to the Superior Court for a redetermination of damages in accordance with this opinion.

So ordered.

NO. 17



ROBERT R. TREMPE, JR., & another v. AETNA CASUALTY AND SURETY
COMPANY

Hmdn. No. 84-573

Appeals Court of Massachusetts, Hampden

20 Mass. App. Ct. 448; 480 N.E.2d 670; 1985 Mass. App. LEXIS 1875

February 7, 1985, Argued

July 24, 1985, Decided

PRIOR HISTORY: [***1] Civil action commenced in the Superior Court Department on March 7, 1979.

The case was heard by *Elizabeth J. Dolan, J.*

DISPOSITION: *So ordered.*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant insurance company sought review of a judgment rendered by the Superior Court Department (Massachusetts) in favor of plaintiff insureds in an action to compel payment on an insurance policy.

OVERVIEW: The insureds' home burned down. Arson was determined to be the cause of the fire and there was some indication that someone associated with the insureds might have had something to do with the fire. The insureds cooperated fully with the insurance company's investigation until the insurance company denied liability. An action was filed and a judgment in favor of the insureds was rendered. The insurance company appealed. The court determined that (1) the trial court did not err when it found that the insurance company was liable under the policy in that there were sufficient facts to support the belief that the insured was not involved in the burning of their home; (2) the insurance company did act in bad faith by being unresponsive in dealing with the claim; (3) the insureds failed to show a loss of money or property as a result of the insurance company's unfair and deceptive acts and it was therefore error for the trial court to double the damages; and (4) the insureds were entitled to counsel fees and prejudgment interest. The order of the trial court was reversed and remanded.

OUTCOME: The court reversed and remanded the matter on the issue of damages.

HEADNOTES

Insurance, Unfair act or practice, Disclaimer of liability, Fire, Interest. Consumer Protection Act, Insurer, Availability of remedy, Unfair act or practice, Attorney's fees.

SYLLABUS

In an action on a policy of fire insurance, following a fire which damaged the plaintiffs' house and its contents, the judge's findings of fact and her conclusions favorable to the plaintiffs were not clearly erroneous. [451-452]

In an action under *G. L. c. 93A*, the Consumer Protection Act, by homeowners against their insurer, there was no error in the judge's conclusions that, although the insurer had a reasonable basis for resisting liability in view of the incendiary nature of the fire that gave rise to the plaintiffs' claim, the insurer had failed to be responsive and cooperative in dealing with the claim; that the insurer's conduct had not been grounded in good faith; and that, in its handling of the claim, it had violated *G. L. c. 176D, § 3 (9) (b), (e), and (n)*. [452-457]

Under *G. L. c. 93A, § 9*, as in effect at the time [***2] of certain unfair or deceptive acts by a defendant insurance company, plaintiffs were not entitled to recover damages against the company in the absence of pleading and proof of loss resulting from the company's unfair or deceptive acts. [457]

Plaintiffs who prevailed on a claim of unfair acts or practices by an insurance company were entitled to re-

cover their attorney's fees under *G. L. c. 93A, § 9 (4)*, even though they were not entitled to damages under *G. L. c. 93A, § 9 (1)*, as in effect at the time of the defendant's unfair acts or practices. [457-458]

Interest under *G. L. c. 175, § 99*, Twelfth, against an insurer for delay in payment of a claim was correctly computed from the date the insurer received an executed proof of loss, rather than from the later date on which the insurer and the insureds agreed on the amount of damages. [458-459]

COUNSEL: *Paul S. Weinberg*, for the insurer.

Burton Winnick (Mark D. Modest with him), for the plaintiffs.

JUDGES: Armstrong, Perretta, & Smith, JJ.

OPINION BY: PERRETTA

OPINION

[*449] [**671] When Robert and Eileen Trempe's house and its contents were damaged by fire on July 29, 1977, they presented a claim for their loss [**3] to their insurer, the defendant Aetna. Aetna declined to pay on the policy on the basis that the Trempes intentionally and knowingly caused or contributed to the cause of the fire. Judgment in favor of the Trempes entered on their complaint brought under *G. L. c. 93A, §§ 2 & 9*, and *G. L. c. 176D, §§ 2 & 3*. On Aetna's appeal, we affirm the judgment as to liability but remand the matter for recalculation of the Trempes' damages consistent with this opinion.

I. The Facts.

As the judge's findings, both subsidiary and ultimate, are not clearly erroneous, see *Page v. Frazier, 388 Mass. 55, 61-62 (1983)*, we relate the facts as [**672] she found them. On Friday, July 29, 1977, the Trempes arrived from work at their Agawam home and began preparations for a weekend camping trip with friends in Hampton, New Hampshire. The trip had been planned for a number of weeks. While packing, Robert received a telephone call from a Dan O'Brien, an acquaintance known to the Trempe family from their frequent weekends at a campsite in Webster, where they owned a vacation trailer. O'Brien wanted to borrow the Trempes' family car because his was being repaired. In addition to the family [**4] car, Robert had a company car for his business and personal use. The family car was a 1973, dark red, Oldsmobile station wagon, equipped with a roof rack and trailer hitch, and bearing registration number "Y82818." Robert agreed and arranged with O'Brien that he (Robert) would leave the keys to the car under the

front seat floor mat in the event the family should leave for the weekend before O'Brien could pick up the car.

At about 6:00 P.M., before O'Brien arrived, the Trempes, their two children and the daughter of their Hampton hosts set out for Hampton, only to return to the house within moments to pick up sunglasses that Robert had left behind. The Trempes' [*450] son, William, went into the house to get the glasses. He used the door closest to the driveway. This side entrance door had had a malfunctioning lock for a number of years, but it was the house entrance typically used by the family.

During the Trempes' brief return to their house, O'Brien arrived to take their family car. He was dropped off by a man driving a red truck who was known only as Jack. O'Brien spoke briefly with the Trempes, took the keys to the car, and left at the same time as the Trempes.

[**5] Approximately forty-five minutes later, the Trempes' next-door neighbors heard what sounded like exploding fireworks coming from the Trempes' house. They ran out towards the noise in time to see an unidentified male run from the Trempes' house, get into a dark red station wagon, and race out of the driveway. They noted a "Y" and an "8" on the license plate of the car. Fire broke out in the house, and the fire department was called.

The Trempes were called in Hampton that night by the police, who advised them of the fire and the extent of the damage (the house was uninhabitable) and asked that they come to the police station in the morning. Leaving Hampton immediately, the Trempes drove to their trailer in Webster. Upon their arrival at the campgrounds, they saw their station wagon. Robert spoke with O'Brien at the campsite.

Saturday morning the Trempes left Webster to go to the police station. O'Brien agreed to meet them there, but he failed to appear. He did go to the police station the following Monday and agreed to participate in a lineup scheduled for a later date. Although the Trempes' neighbors had seen a red pickup truck in the area and the station wagon in the driveway [**6] prior to the fire, the neighbors did not identify O'Brien in the lineup as the man seen running from the Trempes' house.

Subsequent investigation of the fire by fire officials indicated that the fire was incendiary in nature with eight different points of origin. Gasoline had been used as an accelerant.

When the Trempes purchased their house in 1971 for \$ 21,500, their mortgage was in the amount of \$ 19,500. The monthly mortgage payments, which included principal, interest, [*451] and taxes, were about \$ 200. On July 29, 1977, the insurance policy in question provided the following coverages: \$ 34,200, for the

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dwelling; \$ 17,100, for personal property; and \$ 6,840 for additional living expenses. The house was the principal residence of the Trempes and their three children, two of whom (teenagers) were still living at home in July of 1977. Both Robert and Eileen worked, and their anticipated combined gross income for 1977 was in the range from \$ 22,000 to \$ 25,000.

II. Aetna's Liability on the Policy.

Aetna's true quarrel with the judge's findings is that she, as the fact [**673] finder, declined to draw inferences favorable to Aetna rather than the Trempes. But [***7] the judge carefully marshalled the facts favorable to each side, balanced them, and concluded that, as the fact finder, she had not been persuaded by a preponderance of the evidence that the Trempes had caused or contributed to the cause of the fire.

Those facts found favorable to Aetna are: (a) the incendiary nature of the fire; (b) the unexplained presence of "the family station wagon on the property" after the Trempes "had departed the area"; (c) the presence of the unidentified male seen just before the fire leaving the house in the Trempes' "vehicle or one strangely similar to it"; and (d) the borrowing of the family car by an acquaintance before the family left for a weekend trip. On the other hand, the Trempes' mortgage payments (even considering the fact of a second mortgage as a result of a loan from a finance company) "did not constitute an extreme or pressing amount for housing cost." Although both mortgages were one month in arrears on the date of the fire, "that indebtedness was not consequential considering the combined cash flow of the joint salaries." Further, the Trempes' consumer indebtedness "was not substantial," even though Eileen had been involved in an automobile [***8] accident in the fall of 1976, and had been absent from work "on a sporadic basis" for some weeks thereafter. Her medical bills "were apparently covered adequately" by insurance. Inferably, the house had increased in fair market value "with the general rise in real estate values," some capital improvements had been made, and there was no [*452] evidence to show that the house had "deteriorated" or suffered from "neglect." Although the Trempes had increased their homeowner's insurance over the years, that had been done at the "behest of" their insurance agent "to reflect increased costs in construction." The house had never been placed upon the real estate market or offered for sale.

Finally, when the Trempes left for Hampton, they took only those clothes "suitable for their camping weekend." There was no evidence to show that they had removed "personal property or cherished family possessions . . . to a position of safety" prior to the fire, nor was there any evidence indicating marital discord or problems involving the children.

It is not our function to speculate whether another fact finder would have reached a different conclusion. In reviewing subsidiary and ultimate findings, [***9] we look only for clear error. See *Page v. Frazier*, 388 Mass. at 61-62; *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 429-430 (1980). We see no error in the judge's conclusion that the Trempes were due \$ 20,947 under their policy.¹

1 The amount of the loss suffered by the Trempes from the fire was \$ 38,000: \$ 32,000 for their property, real and personal, and \$ 6,000 for their living expenses. Aetna, on May 31, 1979, had paid the Trempes' mortgage, \$ 17,053. See *G. L. c. 175, § 97*.

III. The c. 93A Claim.

In describing the manner (as found by the judge) in which Aetna processed the Trempes' claim, we (like the judge) are mindful that Aetna had a reasonable basis for resisting liability even though the ultimate holding was adverse to its position on that issue.

Aetna's adjusters and representatives began their investigation of the fire by the first week of August, 1977. The Trempes signed the necessary releases so that their financial affairs could be ascertained. [***10] Friends and neighbors were questioned about the fire, as were the Trempes' children. The Trempes requested that when their fifteen-year-old son was interviewed, an adult be present with him. The investigator did not comply with the Trempes' request, which the judge found to be a reasonable [*453] one, and the boy and his parents were extremely upset by the investigator's action. Except for that interview, the judge found Aetna's investigation to be reasonable.

[**674] On August 31, 1977, the Trempes filed a "Sworn Statement in Proof of Loss," declaring their total amount of damages to be \$ 39,000. Their attorney, on September 20, wrote to Aetna and protested the ongoing "investigatory activities" but offered continued cooperation and any other documentation necessary to process the claim. Counsel for the Trempes also asked Aetna to specify any terms or conditions that had not been met in order that they could be satisfied. Eight days later, on September 28, Aetna acknowledged receipt of the Trempes' sworn statement of August 31 and counsel's letter. In this writing of September 28, Aetna also advised that the Trempes' statement had been rejected because the cause [***11] and origin of their loss had not been fully and correctly stated, the amount of their claim was excessive, and for "other good and sufficient reasons."

Left uncertain by this letter whether Aetna was denying liability on the policy, the Trempes, by letter of

November 1, 1977, questioned the basis for the rejection of their statement and requested clear indication whether their claim had been denied. That letter was never answered.

A demand for reference on the issue of the amount of the loss was made by the Trempe on December 6. See *G. L. c. 175, § 100*. Although under that statute, Aetna should have responded within ten days, it did not do so until February 15, 1978. Resort to the reference procedures was ultimately unnecessary because on November 30, 1978, an agreed statement was filed indicating that the damages suffered by the Trempe amounted to \$ 38,000.²

2 After the parties reached agreement as to the amount of the Trempe's loss, Aetna wrote to the Trempe, stating that notwithstanding the agreement as to the amount of the loss, "it is expected that Aetna will deny liability." The judge concluded that, prior to the commencement of this suit, Aetna had never unequivocally denied liability. She viewed Aetna's letter of September 28 as indication that the Trempe's claim had been rejected only because of "certain deficiencies within the statement and claim which were susceptible of correction once further clarification was provided." Aetna contends that when its letters of September, 1977, and November, 1978, are read together, it is clear that Aetna had denied liability. We see no error in the judge's reading of the correspondence.

[**12] [*454] In the meantime, on November 28, 1977, the Trempe's mortgagee had made a demand under *G. L. c. 175, § 97*, for payment on the mortgage in the amount of \$ 17,053. The mortgagee and Aetna had engaged in substantial correspondence on the matter, and the mortgagee had complained to the Commissioner of Insurance. During this period, the Trempe received notices of foreclosure.

On these facts, the judge found: (1) that Aetna's delay in responding to the Trempe's demand for reference procedures was unreasonable in light of the ten-day period imposed by *G. L. c. 175, § 100*; (2) that although some delay in responding to the mortgagee's demand made under *G. L. c. 175, § 97*, was reasonable, Aetna's delay in payment until May 31, 1979, was unreasonable in view of the fact that the amount of damage had been agreed upon on November 30, 1978; and (3) that Aetna had violated *G. L. c. 176D, § 3 (9) (b), (e), and (n)*.³

3 Those subsections, inserted by St. 1972, c. 543, § 1, provide that the following acts constitute unfair claim settlement practices:

"(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

". . . .

"(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

". . . .

"(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

[**13] From our review of Aetna's various claims of error in the judge's findings, we discern two basic contentions: (1) that in view of the circumstances of the fire and the ongoing nature of the negotiations between Aetna and the Trempe and Aetna and the mortgagee, the untimeliness of the responses under *G. L. c. 175, §§ 97 & 100*, was not unreasonable; and (2) that the facts found by the judge do not show that [**675] Aetna had engaged in a pattern of unfair claim settlement practices.

[*455] As to Aetna's first contention, we do not make the suggestion that an insurer must forgo a thorough investigation of a claim that it has a reasonable basis for regarding as suspicious or run the risk of a c. 93A complaint. All that is required is that the insurer deal with its insured with candor and fairness. As stated by the judge in her conclusions of law: "Had the status of liability been clearly established as to the position of . . . [Aetna] at the outset of these proceedings in the fall of 1977, the case might well have fallen into that category of a controversy rooted in genuine differences of opinion wherein there would have been no bad faith on the insurer's part. The failure [**14] of . . . [Aetna] to be responsive and cooperative in dealing with this claim leaves no other conclusion than that it was acting in bad faith."

Aetna's argument that its failure to respond in timely fashion to the demand for reference procedures was due to the ongoing nature of negotiations strikes us as disingenuous in view of the chronology of events. The purpose of *G. L. c. 175, § 100*, is to expedite the settlement of claims. See *Employers' Liab. Assur. Corp. v. Traynor*, 354 Mass. 763 (1968). Yet, on September 28, 1977, Aetna rejected the Trempe's sworn statement of loss of August 31, 1977, and never gave a clear reason for the rejection, notwithstanding the letter from counsel for the Trempe; and an agreement as to the amount of the loss was not reached until almost a year after the Trempe's request for reference and not until after three references had been impeded.

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Aetna contends that it did not delay in making payment to the mortgagee under *G. L. c. 175, § 97*. It points out that it sent the mortgagee a check in the amount of \$ 17,053 on December 8, 1978, just one month after the amount of damages had been agreed upon by the parties. The mortgagee, however, [***15] refused the check, claiming it was owed \$ 19,000, due to interest which had accrued on the mortgage note after the date of the fire. We need not take up the issue whether the mortgagee was in fact entitled to interest. See *Ben-Morris Co. v. Hanover Ins. Co.*, 3 Mass. App. Ct. 779, 779-780 (1975). The question is whether Aetna acted with candor and fairness, and expeditiously, in handling the claim.

[*456] The mortgagee made its demand on Aetna under *G. L. c. 175, § 97*, on November 28, 1977, and on February 15, 1978, the mortgagee filed a complaint with the Commissioner of Insurance. Aetna's response of the same date was that the amount of the loss had not been settled and, therefore, payment was not due. Yet, on September 28, 1977, Aetna's attorney advised it that even were arson by the Trempes established, Aetna would be obligated to pay the first and second mortgagees, and that a "proper fair amount of the claim might be in the area of \$ 32,000. The first and second mortgages total about \$ 22,000." Thus, even were we to agree with Aetna that, contrary to the judge's finding, payment was tendered by Aetna in December of 1978, rather than May, 1979, we would [***16] nonetheless conclude that Aetna's failure to act more promptly was not grounded on good faith.

Aetna's final contention is that assuming (without conceding) that it had violated *G. L. c. 176D, § 3(9) (b)*, *(e)*, and *(n)*, in respect to the Trempes' claim, there was no showing that Aetna's "conduct . . . was part and parcel of a larger, overall pattern of unfair claims settlement practices which . . . [Aetna] customarily engaged in." Aetna relies on *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 675-676 (1983), wherein the court noted, without finding it necessary to decide, that certain clauses of *c. 176D, § 3(9)*, specifically *(d)* and *(f)*, contain language indicating that "multiple refusals or failures, not . . . a single act" must be shown. *Id. at 676*. Clauses *(b)* and [**676] *(e)*, here at issue, see note 3, *supra*, contain comparable language.⁴

⁴ As noted in *Swanson v. Bankers Life Co.*, 389 Mass. 345, 349 n.5 (1983); *G. L. c. 93A, § 9*, as amended by St. 1979, c. 406, § 1, now makes specific reference to *G. L. c. 176D, § 3(9)*. We note that the amendment was effective October 18, 1979, and that it is "to receive only prospective application." *Smith v. Caggiano*, 12 Mass. App. Ct. 41, 43 (1981). The Trempes filed their complaint on March 7, 1979, alleging a violation

of *G. L. c. 93A, § 2*, as well as of *G. L. c. 176D*. See *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. at 676 n.5.

[***17] We need not take up the question left open in *Van Dyke* and *Swanson*, that is, whether a single act can constitute a violation of various clauses of subsection 9 of § 3, because "[c]lause (n) [*457] . . . refers to a single instance of failing to give a reasonable explanation of the basis in the insurance policy for denying a claim." *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. at 676 n.4.

IV. The Judgment.

A. Damages Under *G. L. c. 93A, § 9*.

The judge concluded that the Trempes were entitled to recover \$ 20,947 under the policy. See note 1, *supra*. Because Aetna's violation of *G. L. c. 93A, § 9*, was found to be "wilful and knowing,"⁵ the judge doubled the award. However, under § 9(1), as amended by St. 1971, c. 241, i.e., as in effect on the date "when the incidents underlying the complaint occurred," *Smith v. Caggiano*, 12 Mass. App. Ct. 41, 43 (1981), the Trempes were required to plead and show a loss of money or property as a result of the unfair and deceptive act. The damages here awarded are based on the fire and not on the unfair acts. See *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 101-102 (1983). [***18] Cf. *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 657 (1985). As the Trempes failed to show the amount of the actual damages caused by the unfair acts which the judge found to be wilful and knowing, their recovery under *c. 93A, § 9*, cannot stand.⁶ See *ibid*.

⁵ Aetna also failed to respond in a timely fashion to the Trempes' demand letter under *G. L. c. 93A, § 9(3)*.

⁶ We do not read that part of § 9(3) which provides that a prevailing plaintiff shall recover "the amount of actual damages or twenty-five dollars, whichever is greater," (emphasis supplied) as contradictory of the pre-1979 requirement in § 9(1) that the plaintiff must show a loss of money or property. Rather, we construe § 9(3) as providing a plaintiff who establishes a loss, no matter how small, with a guaranteed recovery of at least \$ 25.

B. Counsel Fees Under *G. L. c. 93A, § 9(4)*.

In *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. at 657-658, we concluded that counsel fees could [***19] be awarded under *G. L. c. 93A, § 11*, even in the absence of proof of actual damages, upon a showing that an unfair act or practice had been committed. *Section 9(4)*, inserted by St. 1969, c. 690, provides in

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pertinent part, and language identical to that of § 11, that "[i]f the court finds in any action commenced [*458] hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action." The evolution of c. 93A has shown that there is a benefit to the public where deception in the marketplace is brought to light (and thereby corrected) by an individual who has been deceived even though his actual damages were not proved. Contrast *Levy v. Bendetson*, 6 Mass. App. Ct. 558, 560 (1978), where the plaintiff in counterclaim under c. 93A, § 11, failed to show that damages had been suffered.

Section 9(4) and § 11 are based upon the same policy considerations and employ identical language with respect to awards of counsel fees and costs. We, therefore, reach a consistent [***20] conclusion and the award of counsel fees is to stand. See *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. at 657-658. In addition, the Trempe's may recover attorneys' [**677] fees for the appellate proceedings in an amount to be determined by a judge of the Superior Court. See *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 272 (1985).

C. Interest Under G. L. c. 175, § 99.

The eighteenth paragraph of G. L. c. 175, § 99, Twelfth, as amended through St. 1973, c. 349, § 1, reads in pertinent part: "The . . . [insurer] shall be liable for the payment of interest to the insured at a rate of one per cent over the prime interest rate *on the agreed figure* commencing thirty days *after the date an executed proof of loss* for such figure is received by the [insurance] company, said interest to continue so long as the claim remains unpaid" (emphasis supplied). The judge concluded that the "agreed figure" was the "actual damages"

sustained by the Trempe's (\$ 20,947) and computed the interest commencing September 30, 1977, the thirtieth day after the Trempe's had filed their sworn proof of loss claiming damages in the amount of \$ 39,000.

[***21] Aetna's sole connection on the issue of interest is that because it rejected the Trempe's statement (as being "excessive"), there was no "agreed figure" until November 30, 1978, the date [*459] Aetna and the Trempe's filed an agreed statement of damages in the amount of \$ 38,000. Hence, Aetna continues, interest should be computed on the actual damages beginning on December 30, 1978.

The judge's award of interest is based upon the clear language of the statute. The key date for the period of interest computation is the date upon which the insurance company receives an executed proof of loss. The "agreed figure" and "an executed proof of loss" are specific and different phrases. This is readily apparent from the seventeenth par. of cl. Twelfth of § 99, as appearing in St. 1981, c. 718, § 2, which mandates the procedures by which the "insured shall forthwith render to . . . [the insurance company] a signed, sworn statement in proof of loss" A reading to the two paragraphs shows that the Legislature has carefully selected its language to provide a system for expediting claims for the benefit of all parties involved. Cf. *First Natl. Bank v. Judge Baker Guidance* [***22] *Center*, 13 Mass. App. Ct. 144, 153 (1982), and cases therein cited. Aetna's contention is contrary to the express language and purpose of the statute. See *Employers' Liab. Assur. Corp. v. Traynor*, 354 Mass. at 763.

V. Conclusion.

The judgment is reversed, and a new judgment is to be entered consistent with part IV of this opinion.

So ordered.