Bad Faith : Overview and Claims Handling Considerations

General Principles

Goal = protection of “consumer” from unfair and deceptive conduct.

Each state enacts its own consumer protection legislation.

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Massachusetts Chapter 93A

Prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, and allows recovery of attorney fees and multiple damages to successful claimants.

M.G.L. c. 93A, § 2, provides:

> *Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, are hereby declared unlawful.*

Comparison Chart

Section 9	Section 11
Brought by Consumer	Brought by Business
Requires Demand Letter	No Demand Letter Required
Violation of c. 176D is automatic violation	Violation of c. 176D is **not** automatic violation

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Section 9 (Consumer) Requirements

- Claimant must suffer an “injury”
- Must send a Statutory “Demand Letter” 30 days prior to filing suit
  - Or, must send “Demand Letter” 30 days prior to amending complaint to add 93A claim
- Demand Letter **not** required if:
  - plaintiff asserting a counterclaim
  - business against whom the claim is made does not maintain a place of business or assets in Massachusetts

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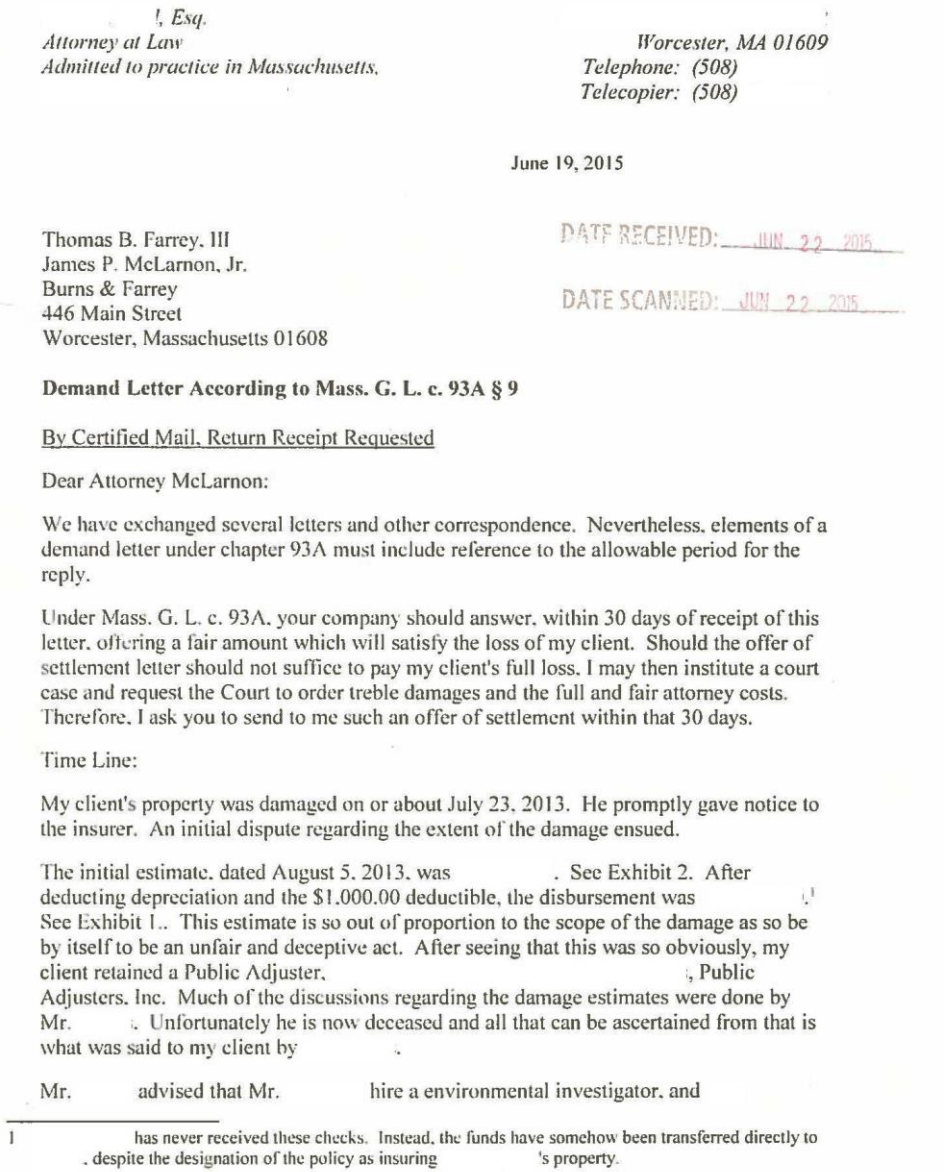

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June 19, 2015

DATE RECEIVED: JUN 22 2015

DATE SCANNED: JUN 22 2015

Thomas B. Farrey, III
James P. McLarnon, Jr.
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446 Main Street
Worcester, Massachusetts 01608

Demand Letter According to Mass. G. L. c. 93A § 9

By Certified Mail, Return Receipt Requested

Dear Attorney McLarnon:

We have exchanged several letters and other correspondence. Nevertheless, elements of a demand letter under chapter 93A must include reference to the allowable period for the reply.

Under Mass. G. L. c. 93A, your company should answer, within 30 days of receipt of this letter, offering a fair amount which will satisfy the loss of my client. Should the offer of settlement letter should not suffice to pay my client's full loss, I may then institute a court case and request the Court to order treble damages and the full and fair attorney costs. Therefore, I ask you to send to me such an offer of settlement within that 30 days.

Time Line:

My client's property was damaged on or about July 23, 2013. He promptly gave notice to the insurer. An initial dispute regarding the extent of the damage ensued.

The initial estimate, dated August 5, 2013, was . See Exhibit 2. After deducting depreciation and the $1,000.00 deductible, the disbursement was [1] See Exhibit 1.. This estimate is so out of proportion to the scope of the damage as so be by itself to be an unfair and deceptive act. After seeing that this was so obviously, my client retained a Public Adjuster, , Public Adjusters, Inc. Much of the discussions regarding the damage estimates were done by Mr. . Unfortunately he is now deceased and all that can be ascertained from that is what was said to my client by .

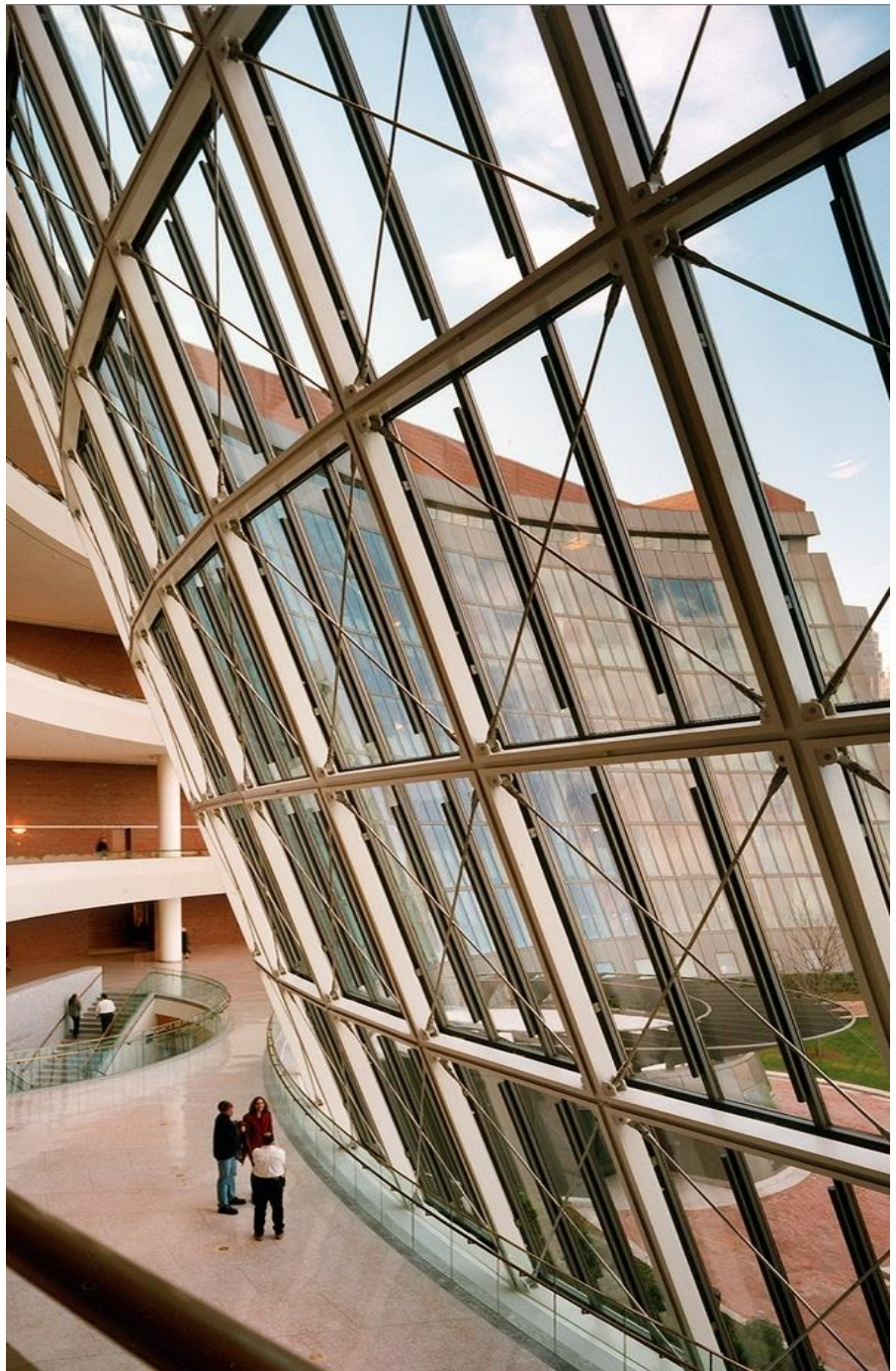
Mr. advised that Mr. hire a environmental investigator, and

1 has never received these checks. Instead, the funds have somehow been transferred directly to . despite the designation of the policy as insuring 's property.

93A Demand Letter Requirements

- The Demand Letter must:
  - Identify the alleged unfair and deceptive conduct acts complained of;
  - Identify the injury suffered; and
  - Specifically notify the recipient that demand is being made pursuant to c. 93A.
- The Demand Letter must give the recipient 30 days to respond and tender a reasonable settlement, if appropriate.

93A Demand Response Letter



- Due Within 30 days
- Opportunity to limit exposure against mandatory multiple damages (if violation willful or knowing) and attorney's fees

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93A Response Letter

- Recipient has an affirmative obligation to investigate to determine whether it should tender a reasonable settlement in response,

- Failure to investigate or respond may evidence bad faith and result in exposure to multiple 93A liability.
  - **This is true even if the underlying unfair or deceptive practice was not knowing or willful.**

- 93A demand letter is not a "suit" triggering duty to defend
  - **BUT** given importance of response letter and opportunity to limit exposure, it is best to have defense counsel involved in drafting

93A Response Letter

If settlement tendered is later found to be reasonable, in relation to the injury actually suffered, court **must:**

- Limit the consumer's recovery to the relief tendered in the response; and
- Limit prevailing consumer's recovery of attorneys fees to those incurred *prior to* rejecting the settlement tender

True even if consumer ultimately prevails on summary judgment or at trial and proves the company engaged in knowing or willful unfair or deceptive acts or practices.

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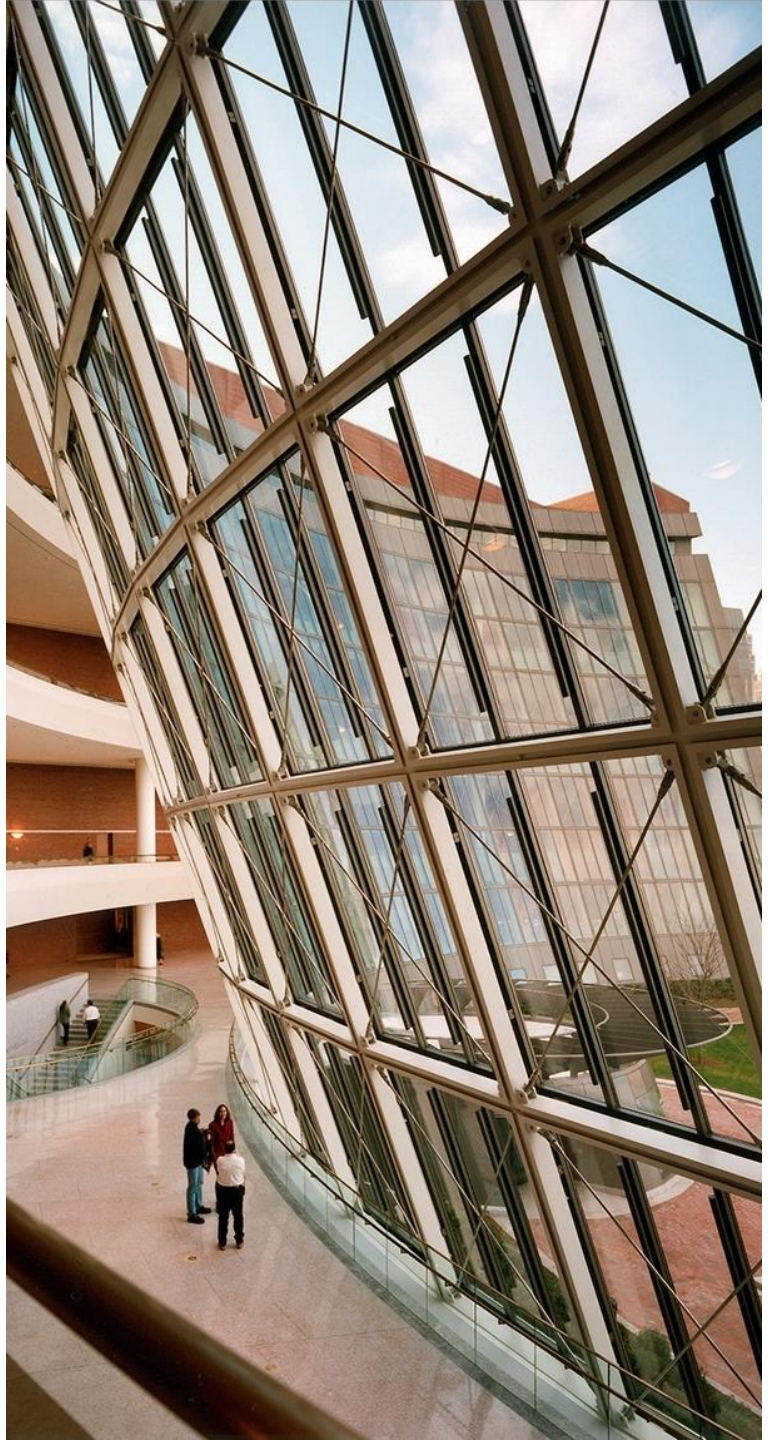
Injury or damage Requirement



- Section 11 = “loss of money or property”
- Section 9 = “Injury” Invasion of a Legally Protected Interest

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Injury or Damage Requirement

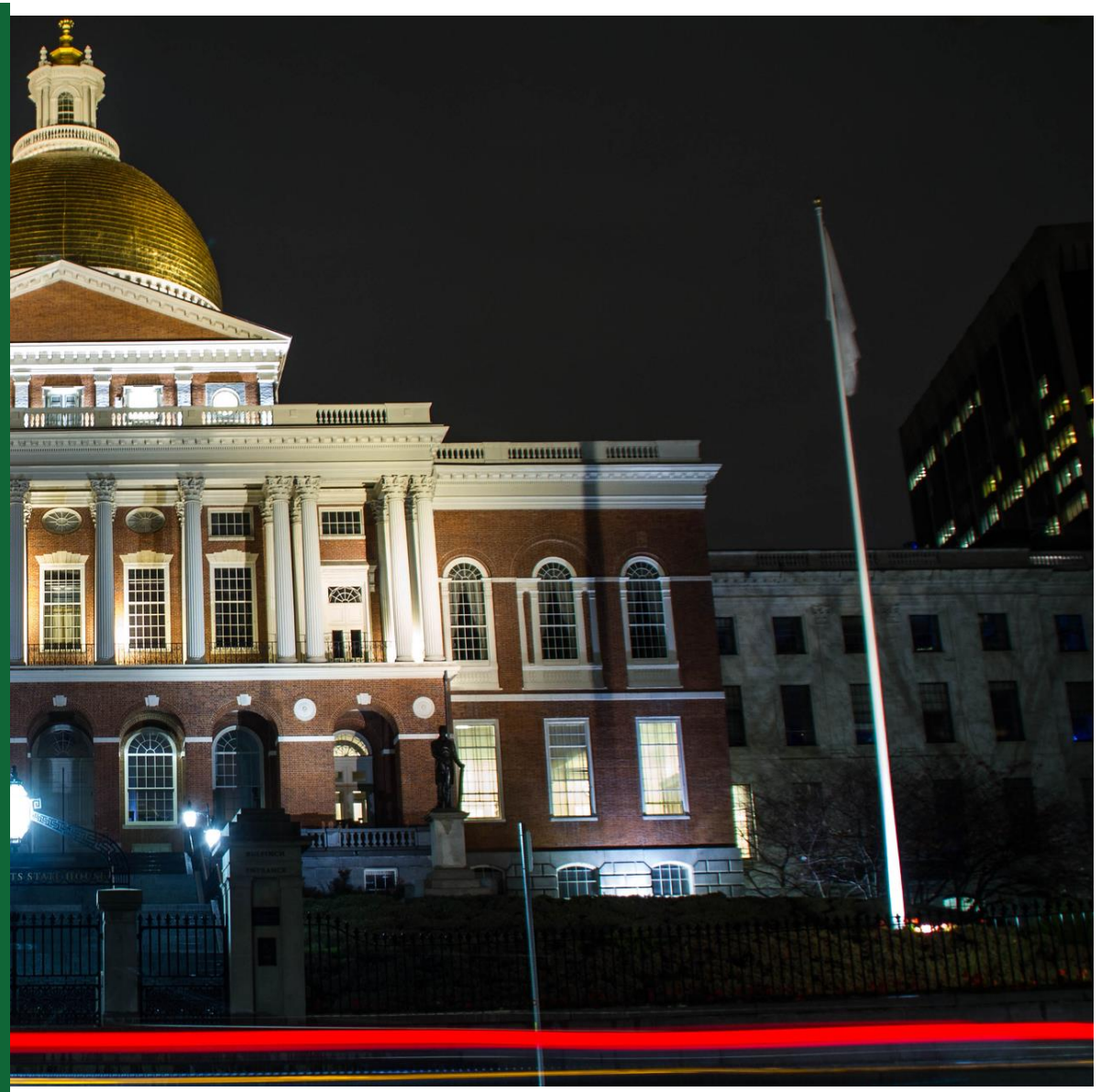
- Section 9 vagueness of "injury" reflects pro-claimant nature of Act.
  - The "injury" must still be causally related to alleged unfair or deceptive act.
  - Emotional distress damages are allowed.
    - IIED elements: outrageous conduct; reasonably expected to injure; causes injury

- The minimum recovery (i.e., when there is a technical violation with minimal or no measurable damage) pursuant to the statue is $25.00.

Damages Overview
Attorney's Fees

Generally, Massachusetts does not allow for attorney's fees, except by statute in very limited circumstances
93A allows for reasonable attorney's fees
Chapter 93A allows for reasonable attorney's fees

- Motivation to bring claims with limited "injuries"
- Can be shifted by reasonable tender of settlement



93A Claims Against Insureds

- Chapter 93A claims can encompass any “unfair or deceptive act,” including for example:
  - Breach of express or implied warranty (products liability claims)
  - Violation of the building code, in some circumstances
  - Substantial and material breach of the implied warranty of habitability
  - Violation of home improvement contractor act M. G. L. c. 142A
  - Violation of lead paint laws

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No Right to a Jury Trial in c. 93A action

Trial judge has three options:

(1) Jury decides

(2) Keep it / Reserve the c. 93A claims for him or herself;

(3) Advisory finding - ask the jury for a nonbinding advisory finding

If choosing the third option, the judge may disagree with the jury findings.

- but must articulate the basis for his/her decision

Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165 (2013)

Facts:

- Jacob Freeman, a local university student, fell down a staircase at "Our House East", a bar and restaurant in Boston, Massachusetts sustaining skull fracture. He died as a result of his injuries.

-Mr. Freeman was a patron at the bar and had walked into a hallway leading to the establishment's rear door to take a phone call

-There was a staircase down to the cellar without a landing and/or door; while talking on his cell phone, he lost his balance and fell down the stairs.

-Parents retained counsel--sent 93A Demand letter, alleging that the staircase was defective in violation of multiple provisions of the State Building Code, and the building code violations constituted unfair or deceptive conduct actionable under c. 93A.

-Brought wrongful death action and c. 93A claims against restaurant owner and owner of building where the restaurant was located.

Klairmont v. Gainsboro Restaurant, 465 Mass. 165 (2013)

Trial:

-Trial judge reserved the c. 93A counts for herself
-Jury found that the defendants were negligent and had violated certain building codes, but that their negligence was not a substantial factor in causing death
-Judge then issued her decision on c. 93A claim—she accepted jury's conclusion on defendants' violation of building codes, but rejected jury's finding on causation.
-Judge concluded that "multiple unsafe conditions of the stairs likely contributed to Jacob's fall".
-Awarded $750,000 to each of plaintiffs for personal loss of decedent, and $744,480 as amount of economic loss Jacob's estate had sustained as a result of his death
- Trebled the amount of damages to $6,733,440 and awarded attorney's fees in the amount of $2,098,875.25 and costs of $254,797.58.

Klairmont v. Gainsboro Restaurant, 465 Mass. 165 (2013)

SJC:

-Defendants appealed to Massachusetts Supreme Judicial Court (SJC)

1. Can building code violations constitute unfair or deceptive conduct within purview of c. 93A?

    -**Yes.** Found defendants "consciously violated the building code for more than 20 years, thereby creating hazardous conditions in a place of public assembly where alcohol is served to commercial patrons".

2. Was trial judge bound by jury's findings re: causation?

    -**No.** Judge wasn't bound by jury's findings as she reserved c. 93A counts.

Unfair Claims Handling Practices: Massachusetts Chapters 93A and 176D

- Violation of 176D is a *per se* violation of Section 9.
  - This is not so with Section 11, but violations can be evidence of bad faith / unfair conduct.
- A single indiscretion is sufficient.
- Claim is also available to claimants who have no direct relationship with the insurers.

Chapter 176 : First Party Claims

Common c. 176D Claims by Insureds:

- Denial of coverage
- Delays in responding to communications
- Failure to protect the insured in settlement negotiations (i.e., excess judgments)
- Improper investigations / standards for investigations
- Failing to make payments to insureds where coverage was clear
- Placing conditions on payments

First Party Claims

General Points to keep in mind:

- An insurer is not liable if the insurer relies on a "good faith, plausible interpretation" of the policy
- An insurer is not liable if it correctly denies or refuses to defend

These are good reasons to rely on coverage counsel when faced with difficult coverage questions

Chapter 176D : Third Party Claims

- Generally, claims involve the prompt failure to settle / make "reasonable" offer

  most commonly litigated sub-section c. 176D, § 3(9)(f) "Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear"

- Points to keep in mind:

  An insurer is not required to extend any offer unless and until **LIABILITY AND DAMAGES** become reasonably clear.

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Chapter 176D, Section 3(9) Examples of Unfair Claims Handling

Introductory language

§ 3. Unfair methods of competition and unfair or deceptive acts or practices

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

. . .

- non-exclusive
- Per se violation under Section 9
- Evidence of a violation under Section 11

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Chapter 176D, Section 3(9):
Examples of Unfair Claims Handling

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

Chapter 176D, Section 3(9):
Examples of Unfair Claims Handling

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

Chapter 176D, Section 3(9):
Examples of Unfair Claims Handling

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds; (First-party context)

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

Chapter 176D, Section 3(9):
Examples of Unfair Claims Handling

(j) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(k) 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

Specific Claims Handling Issues: Claims Investigation

- Promptness of investigation (sub-section b)
- Reasonableness of investigation
- Reserving rights
- Confirming coverage – timing (sub-sections e & n)

Specific Claims Handling Issues: Claims Investigation

PROMPTNESS – Section 3(9)(b)

- No rule setting forth strict times for responses by insurer
- generally required to act
  - with "candor and fairness"
  - "expeditious" handling of the claim
- Insurers have been found liable for:
  - failing to take any position on coverage for nine months, despite repeated requests by the plaintiff, and then repudiating a determination as to coverage eleven months later
  - failing, among other things, to respond for over two months to a request for resort to reference procedures to resolve the amount of the loss
  - taking two to five months to make a minimal response to detailed demand letters and three months to respond to a 93A demand

Specific Claims Handling Issues:

Claims Investigation

- Insurers have been found NOT liable for:
  - A delay of thirteen or fourteen weeks in acknowledging request for coverage
    -During delay insurer was conducting investigation into "complicated … statutory and regulatory violations, and . . . a long history of [insured's conduct] … that required review"
    -Violation of clauses required showing of failure to both "acknowledge 'and act' reasonably promptly"
  - Taking almost two years to respond to a pro forma notice of claim where plaintiff conducted no follow-up and was not prejudiced
  - Where an initial six-month delay due to loss of claim letter between two claims offices; insurer denied coverage within three months of second claims letter

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Specific Claims Handling Issues:

Claims Investigation

BEST PRACTICES:

- Contact relevant key witnesses
- Hire experts, investigate scene ASAP, avoid spoliation
- Avoid mischaracterizations of witness statements
- Consider the motivations of witnesses
- Test hypotheses of false statements by the insured against other available direct evidence on the question
- Consider the insured's motives (or lack thereof)
- Continue the investigation beyond the suspicion stage
- Do not rely solely on favorable investigatory effort of other authorities / sources
- Do not premise a claim of the insured's financial motive solely on the insured's nonproduction of tax returns

Specific Claims Handling Issues:

Claims Investigation / Communications

More BEST PRACTICES:

- Take advantage of available investigative tools
- Communicate with policyholder in timely and professional manner (within 30 days)
- Request information with clear language
- Convey coverage determination clearly
  - Avoid legalese
- Invite further information and discourse when denying coverage
- Treat every communication as a future trial exhibit

Specific Claims Handling Issues

Conveying Coverage Position

- Have standards in place
- Handle each on a case-by-case basis

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Specific Claims Handling Issues:

Conveying Coverage Position

Violation of Section 3(9)(e)
Affirming or denying coverage after proof of loss:

Insurers have been found liable for:

- Failing to ever take a firm position of affirming or denying coverage instead challenging the alleged cause of loss and the amount contained in the proof of loss statement
- Failing to deny the loss until three and a half months after the claim was filed then not paying only because of “suspicions” of misrepresentations concerning the loss without factual support
- Failing to deny the loss for over nine months after the proof of loss was submitted while failing in meantime to conduct a reasonable investigation

Specific Claims Handling Issues:

Conveying Coverage Position

Section 3(9)(e) cont.

Insurers have also been found liable for:

- Failing to deny claim for 29 months while taking steps to induce insured to believe there was coverage
  - Negotiating to settle claim
  - Setting up loss reserve and
  - Charging insured higher premium to renew policy in part on expectation that increased premium was attributable to covered claim

Specific Claims Handling Issues: Third Party Claims

c. 176D Section 3(9)(f): Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

- "reasonably clear liability" is objective test
- "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insured was liable to the plaintiff."
- Direct Actions by Third Party Claimants allowed
- Remember: **"LIABILITY" = FAULT, DAMAGES, CAUSATION**

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Rhodes v. AIG Domestic Claims, Inc., 461 Mass. 486 (2012)

Facts:

- Marcia Rhodes was severely injured when a truck rear-ended her vehicle
- AIG was the claims administrator for the truck's insurance company, National Union
- early on, the TPA for the truck driver's employer's insurer, Zurich American, characterized the claims as "catastrophic" and reported to AIG that the truck driver was clearly liable
- the TPA provided Zurich and AIG with an estimated case value of between $5 and $10 million.
- In September 2003, Rhodes sent a written demand for $16.5 million, which went unanswered.
- A month before trial, AIG mediated the case and offered to settle for $3.5 million. Rhodes rejected this offer.

Rhodes v. AIG, cont'd

Trial

- parties stipulated to liability; issue of damages went to the jury
- jury verdict: $9.412 million that, with interest, came to $11.3 million.
- AIG appealed the tort judgment based on what was described in the opinion as "unusually feeble" grounds.
- Rhodes and AIG eventually settled for $8.965 million.

93A Claim

- Rhodes filed suit against AIG and other defendants alleging failure to effectuate a prompt, fair and equitable settlement regarding AIG's pretrial and post-verdict conduct/negotiations

Rhodes v. AIG, cont'd

Appeals Court held:

- AIG violated the "bad faith" statutes
  - by making the $3.5 million offer, though reasonable, unreasonably late;
  - by deliberately failing to make a prompt and reasonable settlement offer following the jury trial
  - by appealing jury verdict
- violations were knowing and willful violation of c. 176D triggering multiple damages

Supreme Judicial Court:

- affirmed where there is a violation of c.93A, the amount of the judgment is multiplied
- Rhodes entitled to approximately $22 million in 93A damages

Anderson v. National Union Fire Ins. Co. of Pittsburgh, et al., 476 Mass. 277 (2017)

- Pedestrian – bus accident in 1998
- No out of court settlement
- Personal injury case tried in 2003
- Jury awarded Anderson $2.961 million but found him 47% comparatively negligent; $110,000 on loss of consortium claims
  - With prejudgment interest, amount of judgment was $2,224,588.93
- No out of court settlement
- 93A case tried in 2013

Anderson v. National Union Fire Ins. Co. of Pittsburgh, et al., cont'd

- Judge found violation of 93A / 176D §3(9)(d) and (f)
  - Suppressed investigation materials and created alternative accident scenario
  - Manipulated testimony of central witnesses
  - No reasonable grounds to believe insured's interests could be served by appeal of "favorable" judgment

- Violations were "egregious"
  - Warranted doubling of damages
    - upgraded to treble damages on post-judgment motion
  - Both as punishment and deterrent
  - 93A award was $6.5 million to Anderson; $409,000 on each (2) loss of consortium claims

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Anderson v. National Union Fire Ins. Co. of Pittsburgh, et al. Cont'd

Appeals Court

- Both pre- and post-judgment interest are part of judgment to be multiplied

Supreme Judicial Court:

- Pre-judgment interest is part of judgment to be multiplied
- Post-judgment interest **is not** part of judgment to be multiplied
- 93A multiple damages are punitive

Specific Claims Handling Issues: Claims Exceeding the Limits

Issues

- Duty to Defend
- Who to Pay
- Distribution of Limits
- How to Pay: Interpleader?
- Obtain a Release
  - For insured
  - For insurer

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Specific Claims Handling Issues: Claims Exceeding the Limits

Guiding Principles

- Policy Language
  - Leaves discretion with insurer
- Duty to minimize the exposure
  - Peckham v. Continental Cas, 895 F.2d 830 (1st Cir 1990)
- Protect insured from excess judgment
- Dynamic if multiple claimants:
  - Avoid preference to any claimant(s)
  - "not required to rush to settlement . . ."
  - "overeager" settlement is evidence of bad faith

Peckham

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Specific Claims Handling Issues: Claims Exceeding the Limits

Other Considerations

- Insisting upon a release for the insured?
  Lazaris v. Metropolitan P&C, 428 Mass. 502 (1998)
- Insisting upon a release is NOT a violation of Sec 3(9)(f)
- "Settle" v. "Pay"
  Policy provides:
  "payment of judgment or settlements"
  "our duty to settle or defend ends when we pay for damages" equal to limits of liability
  176D uses term "settlement"
- Should insist upon a release for the insured
  Davis v. Allstate, 434 Mass. 174 (2001)

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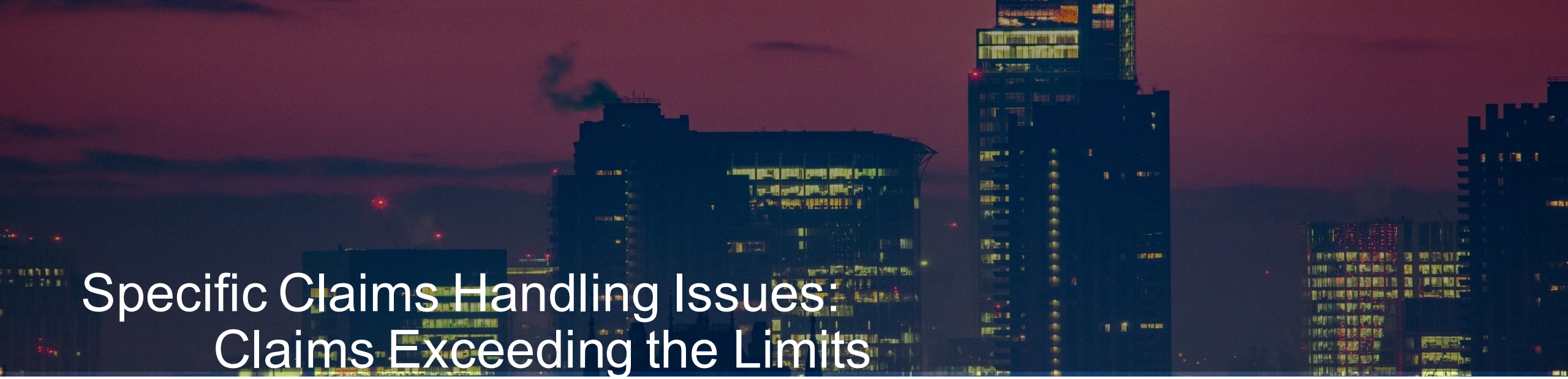
Specific Claims Handling Issues: Claims Exceeding the Limits

- If claimant(s) will not accept limits in exchange for a release of the insured
  → no violation of 3(9)(f) if claim by third party claimant
- Insisting upon a release for the insurer can be bad faith
  Request it; do not Require it
- Interpleader
  To extinguish duty to defend?
  But may not work (Davis v. Allstate)
  "Payment," not a "settlement"



Specific Claims Handling Issues: Claims Exceeding the Limits

BEST PRACTICES / OPTIONS:

- First investigate and determine expected value, ignoring the limits
- Notify the insured of the apparent inadequate limits

  Suggest need for personal counsel
- Attempt to settle all / as many claims as possible in exchange for release(s) of the insured
- Keep the insured / personal counsel informed and involved

  All steps taken; All settlement opportunities

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Rhode Island

- Bad faith claims deemed to "sound in both tort and contract"
  - consequential damages such as economic loss
  - emotional distress and
  - punitive damages

- Punitive damages
  - only where defendant's conduct requires deterrence and punishment over and above compensatory damages."
  - Whether to award is a question left to the trial judge
  - If deemed appropriate, the award is discretionary with the trier of fact
  - No formula for calculating punitive damages
  - But, consider the "injury sustained by the plaintiff and the compensatory damages awarded"
    - (will compare punitive award to compensatory award)

Rhode Island

- Attorney's fees only allowed if there is a contractual or statutory basis
  - a successful coverage challenge
  - § 9-1-45 authorizes such awards in breach of contract actions where finding of a "complete absence of a justiciable issue" by the losing party
- "fairly debatable" standard
  - R.I.G.L. § 9-1-33, Skaling v. Aetna, 799 A.2d 999 (RI 2002)

Unfair Claims Handling – Rhode Island

Based on the Model Unfair Claims Settlement Practices Act Developed by the National Association of Insurance Commissioners

R.I.G.L. 27-9.1-4

Specific Claims Handling Issues:
Claims Exceeding the Limits: Rhode Island

"Asermely" Demands

- Demand for the limits
- Possible excess exposure
- If no settlement, insurer pays judgment as if no limits
  Asermely v. Allstate, 728 A.2d 461 (R.I. 1999)
- Does not matter if insurer believes in good faith it has a legitimate defense against the third party

Rationale: fiduciary duty to act in the "best interests of its insured in order to protect the insured from excess liability... [and to] refrain from acts that demonstrate greater concern for the insurer's monetary interest than the financial risk attendant to the insured's situation."

Specific Claims Handling Issues:
Claims Exceeding the Limits: Rhode Island

DeMarco

- Extends "Asermely" exposure to multiple claimants scenario
  DeMarco v. Travelers Insurance Company, 26 A.3d 585 (R.I. 2011)
- Even if claim against insured is "fairly debatable," an insurer is obliged to engage in settlement discussions "in an effort to relieve the insured from the burden and expense of litigation."
- No clear rule
- Rather, court will look to determine: whether or not the insurer did everything it reasonably could to minimize the amount of that direct liability

Connecticut: Unfair Insurance Practices Act, G.S.A. § 38a-815, 816

Insurers required to:

- settle "promptly" where liability has become reasonably clear
- provide a reasonable explanation of the basis in the insurance policy for the denial of a claim or offer a compromise settlement "promptly."
- accept a good faith settlement offer within policy limits.
  consider the interests of the policyholder in addition to its own in determining whether to accept the settlement offer
- In order for an injured claimant to bring a claim for bad faith before the liability of the insured had been established, the claimant has to be a party to the insurance contract or be subrogated to the rights of the insured.

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New Hampshire

- Statutory (RSA 417:4) and common law (in the context of a contractual duty of good faith) aspects
- Courts have recognized a duty to insurers to use reasonable care in the settlement of third-party liability actions.
    - "reasonableness" standard applied to assess an allegedly unfair denial of payment
        - bad faith only where the denial of payment is "calculated and not inadvertent."
- insurer's wrongful refusal, or delay, to settle a first-party claim does not result in a cause of action sounding in tort
- No private right of action against insurer without administrative finding of violation

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Maine: Unfair Claims Settlement Practices Act 24-A M.R.S.A. §2436-A(1)(A)).

- Insurer may be liable to an insured if it negligently fails to settle within the policy limits

- Requires "something more than a mere dispute between the insurer and insured as to the meaning of certain policy language" must be shown to support a "knowing misrepresentation" of policy provisions relating to coverage at issue

- Third-party tort claimant does not have the right to assert a bad faith claim against the tortfeasor's insurer.

Vermont

- Recognizes a cause of action against an insurer for the bad faith handling of third-party claims brought against the insured
  - Courts apply a "fairly debatable" standard for insurers to challenge claims.
  - Recovery against insurers limited to instances where the insurer not only errs in denying coverage, but does so unreasonably.

- If the policyholder's bad faith claim survives the "fairly debatable" test, the insured then has to prove that the insurer "knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim."

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