UPDATE ON THE LAW

Recent Developments in the Calculation of Damages Against Insurers Under Massachusetts General Laws Chapter 93A, the Consumer Protection Act

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I. Introduction

Prior to 1989, the case law on the issue of how damages were calculated in so-called "bad faith" cases against insurers was well-developed and in harmony with common law principles of causation.[1] It was also commonly understood that the legislative purposes underlying the Consumer Protection Act, Massachusetts General Laws Chapter 93A (Chapter 93A), were well-served by the existing method of awarding both compensatory and punitive damages.[2]

In late November, 1989, however, the Legislature enacted Chapter 580 of the Acts of 1989 (Amendment), which added the following sentence to Chapter 93A, sections 9(3) and 11:

For the purposes of this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim.[3]

The Amendment was made effective as of March 5, 1990.[4] Since the effective date of the Amendment, there have been many questions raised with respect to how the Amendment should be construed in cases against insurers. The most significant question is how the phrase "the amount of the judgment" will be used to calculate damages.[5] This question arises both in first-party disputes between the insured and the insurer and in third-party claims where an injured person has a claim against the tortfeasor/insured and the insurer.[6] Another issue is how the Amendment should be construed in cases where the insurer has tendered a settlement under Chapter 93A, section 9(3).[7] Several recent cases have addressed some of these issues and are discussed below.[8]

The legislative purposes underlying both single and multiple damages and the Chapter 93A demand letter provisions are now open to question under the Amendment. Although the purpose of the statute is to encourage settlements, the Amendment acts as a disincentive for settling tort claims because of the additional Chapter 93A damages measured by "the judgment."[9] Moreover, it is questionable whether the legislative purpose for punitive damages is furthered by the Amendment. Under the Amendment, the punitive remedy against an insurer is potentially Draconian, since it is measured by the conduct of the tortfeasor over whom the insurer had no control. There is also no discernable purpose for the distinction made in awarding multiple damages between claims resulting in judgments and claims, such as arbitration disputes, that do not result in judgments.[10] The Amendment creates an arbitrary difference in measuring multiple damages between different claims that may arise from the same insurance policy.[11]

Some of these issues have recently been addressed by Massachusetts trial and appellate courts with inconsistent interpretations of the Amendment. There have been several decisions applying the Amendment against insurers which illustrate the substantial exposure these cases now have and the many questions that arise in evaluating Chapter 93A damages.

II. The Amount of "The Judgment" as Chapter 93A Damages

Under Chapter 93A, section 9, a plaintiff who proves an unfair act or practice is entitled to recover his "actual damages or twenty-five dollars, whichever is greater."[12] Before the Amendment, the case law clearly dictated that Chapter 93A actual damages would be those damages proximately caused by the conduct of the insurer.[13] Thus, in a Chapter 93A case where the insurer failed to offer a claimant a reasonable settlement amount, the insurer would be liable for the loss of the use of the unpaid money by the claimant from the time of the demand to the eventual payment.[14]

In addition, section 9(3) of Chapter 93A provides that if the plaintiff proves that the insurer's unfair act or practice was wilful or that the insurer refused "to grant relief upon demand . . . in bad faith," the plaintiff receives two or three times "such amount" (the amount of actual damages).[15] Before the Amendment to Chapter 93A, section 9(3), the term "such amount" in the multiple damage provision[16] was construed to be the amount of the "`actual damages'" which, in turn, was construed to be the injury suffered by the plaintiff.[17]

The language of the Amendment is ambiguous and raises questions about the correct method for calculating damages in Chapter 93A cases. First, since the Amendment provides that "the amount of actual damages to be multiplied . . . shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence,"[18] where there is a judgment[19] in an "underlying transaction or occurrence,"[20] then any double or treble damages award (the damages to be multiplied) would be based upon the amount of that judgment. This new formula for calculating damages is inconsistent with the preceding language of section 9, which bases the damages recovery on the "injury actually suffered," a term which implies an economic injury caused to the plaintiff.[21]

The Amendment has also confused the meaning of the term "actual damages."[22] Although the Supreme Judicial Court has not considered the issue, the Massachusetts Appeals Court has recently ruled that in non-multiple damages cases where only actual damages are awarded, the amount of actual damages is not measured by the judgment on the underlying case, but rather by the traditional compensatory damage formula.[23] Since the underlying judgment is used as actual damages only in multiple damages cases, there are now two methods to calculate actual damages in Chapter 93A cases: the traditional compensatory formula in single damage cases, and the judgment amount in multiple damages cases.[24]

A related issue under the Amendment arises in the case where the underlying tort or contract judgment has already been paid by the insurance company. In that case, the issue is whether the Chapter 93A actual damages duplicate the judgment amount that has already been paid. For example, if the Chapter 93A claimant recovers a $100,000 tort judgment against the insured/tortfeasor and is paid that judgment from the insurance policy, the question arises whether the insurer receives a credit for the $100,000 on the Chapter 93A multiple damages. The $100,000 judgment constitutes the value of claimant's bodily injuries for which the claimant has been paid. The last phrase in the Amendment states that the amount of the judgment is the damage amount "regardless of the existence or nonexistence of insurance coverage available in payment of the claim."[25] Thus, if there is insufficient insurance coverage for the judgment and the Chapter 93A claimant has *not* been paid for his tort damages, then the Chapter 93A damages would not be a duplication of the unpaid part of the tort judgment.

A. *First-Party Claims*

A first-party claim involving an insurer usually arises from the insured's demand for coverage under an insurance policy. This can be for either property damage or bodily injury coverage. It can also arise from coverage disputes relating to a claim against the insured. Frequently, first-party suits include both contract claims under the policy and Chapter 93A claims. For purposes of Chapter 93A damages, a first-party suit against an insurer is similar to a suit against any other party to a contract.

In the case of *Wyler v. Bonnell Motors, Inc.*,[26] the Massachusetts Appeals Court ruled that in a multiple count complaint where the plaintiff recovered on a breach of contract claim and also proved a violation of Chapter 93A for the same conduct, the plaintiff could only recover *one* judgment, and that the Chapter 93A damages were "subsumed" within the parallel common law claim damage recovery.[27] That holding is consistent with prior cases which have held that a plaintiff can recover his damages only once, although there are many theories of recovery.[28] The *Wyler* court further ruled, however, that additional multiple damages (double) were not subsumed and, therefore, an additional amount of single damages was owed to constitute a total award of double damages under Chapter 93A.[29]

Although the issue has not yet been decided on appeal, it would be logical for an appellate court to rule that the *Wyler* principle of one recovery is also applicable to suits against insurers based on both contract and Chapter 93A claims.[30] An unanswered question, however, is how the Amendment will apply to a multiple damages award against an insurer in a first-party case. The Amendment provides for a multiplication of the judgment "on all claims arising out of the same and underlying transaction or occurrence."[31] This language is confusing when applied to the typical first-party contract claim brought by an insured against his own insurer.

Another significant holding by the *Wyler* court was that a judge who is hearing a Chapter 93A claim at the same time that a jury is considering common law claims, may come to a different determination as to damages even if the Chapter 93A claim is based on the same facts as the common law claims.[32] The Amendment raises questions about the correct use of this procedure, at least in the case of multiple damages recovery.[33] If the judgment amount is the measure of Chapter 93A damages, then there is no discretion for the court to decide such damages based on common law principles of causation.

B. *Third-Party Claims*[34]

1. Multiple Damage Awards in Third-Party Cases

In the recent Massachusetts Appeals Court case of *Cohen v. Liberty Mutual Insurance Co.*,[35] the court stated:

we do not believe that the Legislature intended the 1989 amendment to abolish the traditional requirement . . . that a c. 93A claimant must show a causal connection between the defendant's wrongful conduct under c. 93A and the claimant's damages and also that the damages were foreseeable as a result of the defendant's breach of c. 93A.[36]

In the *Cohen* case, Liberty Mutual disputed that it provided coverage to the owner of a van who caused injury to the plaintiff during an unloading operation.[37] The plaintiff obtained a $90,000 default judgment against the van owner and then sued Liberty Mutual under Chapter 93A for refusing to acknowledge coverage.[38] After the Chapter 93A trial, the judge entered judgment against Liberty Mutual for treble the $20,000 limits of coverage.[39]

The plaintiff appealed on the issue of whether his Chapter 93A award should have been based on the judgment of $90,000, rather than the policy limits of $20,000.(40) The appeals court agreed with the trial judge that the "actual damages" under Chapter 93A were the unpaid policy limits and not the tort judgment, since at the time the judgment was rendered, Liberty Mutual had a good faith belief that there was no coverage.(41)

The holding of the *Cohen* case cannot be reconciled with either the language of the Amendment or the pre-Amendment cases on Chapter 93A damages. Moreover, it is manifestly inconsistent with a Chapter 93A case decided by the appeals court just five months later.(42)

The plaintiff in *Cohen* had a "judgment" against the defendant's insured.(43) Furthermore, that judgment was on a claim arising out of the underlying occurrence; to wit, the unloading accident.(44) Why then would not the Chapter 93A multiple damages be measured by the amount of that judgment as provided by the Amendment? The fact that the amount of the judgment was higher than the amount of the policy coverage should not matter because the last clause of the Amendment provides that the measure of damages is the judgment amount "regardless of the existence or nonexistence of insurance coverage available in payment of the claim."(45)

The statement by the court in *Cohen* that the Legislature did not intend the Amendment to abolish the requirement of causation is wholly unsupported.(46) Neither the legislative history of the Amendment nor the text of the Amendment support such a conclusion.(47) On the contrary, the Amendment clearly changes the traditional requirement of proof of causation of damages.(48) Indeed, that is evidenced by the *Cohen* award of the policy limits.(49) The appeals court upheld the treble damages award of $20,000 although the insurer did not cause a $20,000 loss.(50) The insurer's delay in paying that amount caused the plaintiff to lose interest that could have been earned during that delay period. The insurer was not a joint tortfeasor on the underlying bodily injury case and did nothing to contribute to the cause of that injury for which $20,000 was paid.

The pre-Amendment case law is clear that under the traditional, i.e., common law principals of causation, an insurer that wrongfully denies coverage is liable under Chapter 93A only for the delay in paying the policy and not for the amount of the policy.(51) These cases are clear precedents for cases such as *Cohen* where the Chapter 93A damages are awarded after the underlying policy has been paid in full.

To be sure, the *Cohen* case may be limited to its somewhat unusual facts. The case did not decide how damages will be calculated in the typical Chapter 93A claim where the insurer failed to make a reasonable offer, and the plaintiff obtained a tort judgment against the insured. A partial answer to that question came in the most recent Chapter 93A decision of the Massachusetts Appeals Court in *Yeagle v. Aetna Casualty & Surety Co.*,(52) which was decided five months after the *Cohen* case.(53)

In *Yeagle*, the trial judge reasoned that even though there was no wilful conduct meriting multiple damages, because of the Amendment, single damages under Chapter 93A were measured by the amount of the tort judgment against the insured.(54) The appeals court rejected this interpretation of the Amendment and read the Amendment restrictively to apply the judgment amount only for the purpose of bad faith multiplication.(55) Furthermore, the appeals court stated that where only single damages are awarded under Chapter 93A, the damages are limited to those caused by the insurer, such as lost interest.(56)

The *Yeagle* court held that pursuant to the Amendment where there is a multiple damage award against an insurer under Chapter 93A, the amount of the tort judgment is used as the amount to be multiplied.[57] This construction of the Amendment is logically based on the language: "the amount of actual damages *to be multiplied* by the court shall be the amount of the judgment."[58] The holding in *Yeagle*, however, results in the anomaly that the term actual damages will be calculated in two ways: (1) the amount of the judgment in multiple damages cases, and (2) the lost interest on unpaid settlement money in non-multiple damages cases.[59]

The analysis of the legislative intent behind the Amendment by the *Yeagle* court is inconsistent with the analysis of the legislative history by the *Cohen* court. In *Yeagle*, the court noted that before the Amendment it was "long understood" that Chapter 93A damages were limited to the loss of use of the unpaid coverage amount.[60] This is consistent with the statement in *Cohen* about the "traditional" requirement of causation.[61] The *Yeagle* court, however, recognized that the Legislature was "inspired" to change the outcome of the pre-Amendment cases in order to achieve an "in terrorem" sanction.[62] Thus, the *Cohen* court read the Amendment as *not* changing the traditional requirement of causation, while the *Yeagle* court acknowledged that such a change *was* the specific purpose of the Amendment.[63]

The construction of the Amendment by the Massachusetts Appeals Court in *Yeagle* will likely be upheld by the Supreme Judicial Court. In the recent case of *Clegg v. Butler*,[64] the court overturned the decision of a superior court judge who had awarded $750,000 in Chapter 93A multiple damages against the defendant insurer.[65] The *Clegg* case involved a third-party claim brought by a man who was injured in an automobile accident.[66] The defendant was insured with Utica Insurance Company with primary coverage of $250,000, and excess coverage with another insurer for one million dollars.[67] The primary insurer, Utica, did not offer its full coverage limits until long after litigation was underway.[68] At that point, the excess insurer offered part of its policy for a total settlement of $675,000.[69] After the subsequent Chapter 93A trial, the trial judge found that Utica had acted in bad faith in not promptly paying its $250,000 coverage to the plaintiff and, therefore, awarded that policy amount as Chapter 93A damages and ordered that it be trebled.[70]

The trial judge's only reference to the Amendment was that "pursuant to Acts of 1989 c. 580 [the Amendment], the plaintiff is entitled to entry of judgment in the amount of $250,000 and multiple damages upon that sum."[71] On appeal, the Supreme Judicial Court ruled that since the case was settled, there was no "judgment" on which to base multiple damages.[72] Accordingly, the only Chapter 93A damages were those caused by the delay in making the payment.[73]

The *Clegg* court suggested, but did not explicitly hold, that the tort judgment would be the basis for Chapter 93A damages *only* when there is a multiple damage award.[74] The court noted that the Amendment "greatly increased the potential liability of an insurer who [violates Chapter 93A]."[75]

III. Tender of Settlement

Under section 9 of Chapter 93A, a "respondent" can answer a demand letter by making a "written tender of settlement."[76] A settlement offer limits the plaintiff's damages to the amount offered if "reasonable in relation to the injury actually suffered."[77] This coupling of the demand requirement with the corresponding offer provision is at the heart of the statute, since its purpose is to encourage settlement.

(78)

Under the Amendment, however, a question arises where a defendant has made a settlement offer which was not accepted. In those cases, a question arises in calculating the "injury actually suffered" in order to determine if the tender of settlement was reasonable.(79) By linking Chapter 93A damages to a judgment on a case against a different defendant, the Amendment makes the term "injury" ambiguous. Does the insurer's offer have to be reasonable in relation to the "amount of the judgment" in the tort action or is it sufficient for the offer to be an amount which is reasonable in view of the injury caused by the conduct of the insurer? In view of the *Yeagle* case, holding that causation of damages is still required in calculating single damages cases against insurers,(80) the answer should be that an offer made pursuant to Chapter 93A, section 9, is still measured by the injury caused by the insurer. For example, in the case of a plaintiff who claims bodily injuries, and recovers a judgment against the tortfeasor for $100,000, the only "injury" he has "actually suffered" from the insurer's conduct is a delay in receiving the payment of the money. The $100,000 is the injury caused by the tortfeasor/insured.

The Amendment has the perverse consequence of discouraging settlements since it creates an incentive to obtain a judgment in the underlying tort action rather than settle the tort action. By impairing the legislative objectives of encouraging settlements and punishing wilful conduct, the Amendment has achieved the opposite result from what the original drafters of Chapter 93A intended. Now, the Chapter 93A "tail" is wagging the tort claim "dog." Cases that should be settled may become difficult to settle because the plaintiff would want to obtain a judgment even where there is a reasonable settlement offer on the tort claim. Take, for example, a clear liability case where the insurer makes a low offer to the plaintiff and later substantially increases the offer to an amount which, but for the Chapter 93A claim, would have settled the case. In view of the Amendment, there must be a judgment obtained in order to create a damage exposure beyond the lost interest on money. Thus, the Amendment may discourage settlement of tort actions.

IV. Punitive Damages

Chapter 93A was originally intended to provide two types of damages. First, actual damages were intended to compensate a plaintiff for an actual injury.(81) If the plaintiff has not suffered an injury, the statute provides for nominal damages of twenty-five dollars.(82) In either case, attorneys' fees are awarded so that the cost of litigation is not a deterrent to pursuing cases involving small amounts of money.(83) Second, the statute prescribes that multiple (punitive) damages are awarded only if certain wilful conduct is proven against the defendant.(84) The purpose of multiple damages is to deter and punish.(85)

The Amendment increases the punitive sanction significantly. The *Yeagle* court explained the legislative purpose as follows:

Now there could be dissatisfaction with the "interest" basis of calculation in the type of c. 93A case where a defendant insurer had acted in bad faith in declining reasonable settlement and the plaintiff had been obliged to try to the end an action on the underlying claim. In such cases it might appear to some onlookers that multiplication of the mere interest element would often not serve as sufficiently punitive of the defendant malefactors. Hence the 1989 amendment, which threatened a bad faith defendant with multiplication of the amount of the judgment secured by the plaintiff on his basic claim--a total that might be many times over the interest factor, was arbitrary in the sense that it exceeded the injury caused by the c. 93A violation, and worked an in terrorem addition to what was already a punitive sanction. It is common ground that the amendment was inspired by multiplication cases of the kind mentioned.(86)

By measuring punitive damages based on the conduct *of another party* (the tortfeasor), the Amendment has changed a rational basis-multiplication of damages caused by the insurer, to an arbitrary basis-multiplication of damages not caused by the insurer. Take, for example, the case of an insurer that provides one million dollar coverage to a truck driver who negligently causes an accident resulting in significant injury. If the insurer unreasonably and wilfully delays in promptly[87] responding to a demand, but then offers the full policy limits within ninety days of the demand, a judge would be nevertheless warranted in finding a violation of Chapter 176D,[88] which is a *per se* Chapter 93A violation.[89]

This technical violation of Chapter 176D caused only a loss of the use of the unpaid policy during the sixty days following the demand. If, despite the offer, the case was not settled and a judgment entered for one million dollars, the insurer would not benefit from this offer as a "tender of settlement" since it was not made within thirty days.[90] Since Chapter 93A multiple damages are measured by the amount of the tort judgment, if the court further found that the insurer's failure to offer the policy limits within the thirty day demand period was "with knowledge or reason to know" and an unfair practice, then the multiple damages would be based on the million dollar judgment.[91]

By using the judgment as a basis for multiple damages, the punitive remedy is not proportional to the conduct because the insurer is punished the same for a short delay in responding to a demand as it is punished for a long delay in responding. There is no correlation between the amount of the punitive award and the degree of the insurer's conduct, with the exception of the difference between double and treble damages. In addition, the deterrence purpose of the punishment is misdirected since the punitive damages are not based on the conduct of the insurer, but are measured by the fortuity of the underlying judgment against a tortfeasor who was not under the control of the insurer.

The illogic of the Amendment with respect to punitive damages is also illustrated by the fact that it does not apply to arbitration awards or settlements on the underlying claim.[92] If no judgment is obtained, multiple damages are based only on the loss of the use of the money owed by the insurer.[93] Thus, the same conduct by an insurer is punished in different ways under a single insurance policy. For example, under the Massachusetts Auto Policy, an underinsured motorist claim is decided by an arbitration award as opposed to a third party civil action resulting in a judgment.[94]

The appeals court in *Yeagle* speculated without the benefit of any legislative history that the use of the judgment only in multiple damages cases was the intent of the legislature.[95] The truth is that the legislative intent can scarcely be discerned from this ambiguous and illogical Amendment.

V. Conclusion

In view of the ambiguities contained in the Amendment and the concern that the Amendment conflicts with the legislative purposes underlying Chapter 93A damages, corrective legislation would be the best way to restore the requirement of proximate causation for calculating all damages under Chapter 93A. Under the Amendment, the damages recoverable under Chapter 93A against insurers will not serve the objectives behind the Consumer Protection Act and will, in fact, discourage the settlement of tort claims.

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1. *See, e.g.*, Bertassi v. Allstate Ins. Co., 522 N.E.2d 949, 953 (Mass. 1988); DiMarzo v. American Mut.

Ins. Co., 449 N.E.2d 1189, 1199-1200 (Mass. 1983); Wallace v. American Mfrs. Mut. Ins. Co., 494 N.E.2d 35, 37 (Mass. App. Ct. 1986).

2. *See* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

3. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996). The process by which the Amendment was added to Chapter 93A does not inspire confidence in the integrity of the legislative process. The Amendment was a late filed bill and was passed without a recorded vote and, as far as the record indicates, without notice to the insurance community. *See* John D. Boyle, *The Elimination of Causation in 93A Actions Against Insurers*, Boston Bar J., Jan.-Feb. 1991, at 14. While affecting all Chapter 93A defendants, the Amendment is directed at insurers. *See id.*

4. *See* Greelish v. Drew, 622 N.E.2d 1376, 1379 (Mass. App. Ct. 1993). In *Greelish*, the appeals court ruled that the Amendment affected substantive rights and, therefore, was not merely procedural. *See id.* at 1378-79. Accordingly, the court ruled that the Amendment would only be applied prospectively to conduct after March 5, 1990. *See id.* at 1379.

5. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

6. *See infra* Part II.A-B.

7. *See* Mass. Gen. Laws ch. 93A, § 9(3) (1996); *see also infra* Part III.

8. *See infra* Parts II, III, IV.

9. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

10. *See infra* Part IV.

11. *See id.*

12. Mass. Gen. Laws ch. 93A, § 9(3) (1996).

13. *See* Wallace v. American Mfrs. Mut. Ins. Co., 494 N.E.2d 35, 37 (Mass. App. Ct. 1986); *see also* Bertassi v. Allstate Ins. Co., 522 N.E.2d 949, 953 (Mass. 1988); DiMarzo v. American Mut. Ins. Co., 449 N.E.2d 1189, 1200 (Mass. 1983).

14. *See Wallace*, 494 N.E.2d at 37.

15. Mass. Gen. Laws ch. 93A, § 9(3) (1996).

16. *Id.*

17. *DiMarzo*, 449 N.E.2d at 1199-1200 (quoting Mass. Gen. Laws ch. 93A, § 9(3) (1996)); *see also Wallace*, 494 N.E.2d at 37.

18. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

19. "The term `judgment'" has been construed to mean a judgment in a civil action and not an arbitration award. Bonofiglio v. Commercial Union Ins. Co., 576 N.E.2d 680, 684 (Mass. 1991).

20. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

21. Mass. Gen. Laws ch. 93A, § 9(3) (1996).

22. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

23. *See* Yeagle v. Aetna Cas. & Sur. Co., 679 N.E.2d 248, 250-52 (Mass. App. Ct. 1997).

24. *See id.*

25. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

26. 624 N.E.2d 116 (Mass. App. Ct. 1993).

27. *Id.* at 119.

28. *See* Calimlim v. Foreign Car Ctr. Inc., 467 N.E.2d 443, 447-48 (Mass. 1984); *see also* Refuse & Envtl. Systems, Inc. v. Industrial Servs. of America, Inc., 932 F.2d 37, 42-44 (1st Cir. 1991) (stating that Chapter 93A damages may not duplicate damages awarded on other grounds).

In a jury-waived contract/Chapter 93A action, a superior court judge found in favor of the plaintiff on both misrepresentation and Chapter 93A counts and awarded only one amount of compensatory damages. *See* Whittenberger v. Tom O'Brien Nissan, Inc., 3 Mass. L. Rptr. (Mass. L. Book Co.) 515, at 521 (June 5, 1995). The case involved a dispute between two car dealers over the sale of a Mercedes found to be stolen. *See id.* at 516-17. The court awarded $5000 for a Chapter 93A violation. *See id.* at 519. Attorney fees and costs were $17,140, with a total judgment of $27,140. *See id.* at 518-19. This reflects that only one amount of the $5000 was awarded. *See id.* at 519. There was no duplication of compensatory damages under Chapter 93A. *See id.*

29. *See Wyler*, 624 N.E.2d at 119.

30. The *Wyler* court did not discuss the Chapter 93A Amendment provision that actual damages are the amount of the judgment. *See id.* at 118-19. The possible reason the *Wyler* court did not discuss the Amendment is that the conduct at issue occurred prior to the enactment of the Amendment. *See id.* at 117.

In another case involving pre-Amendment conduct, the Massachusetts Appeals Court upheld a Chapter 93A award that was subsumed within an award under a common law misrepresentation count. *See* Standard Register Co. v. Bolton-Emerson, Inc., 649 N.E.2d 791, 795 (Mass. App. Ct. 1995).

31. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

32. *See Wyler*, 624 N.E.2d at 118.

33. The procedure by which a judge can separately decide damages based upon the same evidence heard by a jury is not well founded on either logic, statutory construction, or common law principles. On the contrary, it is inconsistent with settled principles of collateral estoppel and res judicata. In a recent Supreme Judicial Court decision, however, the Court approved of the judge deciding the Chapter 93A damages claim separate from the jury's decision on companion common law claims. *See* Jacobs v. Yamaha Motor Corp., 649 N.E.2d 758, 760-61 (Mass. 1995).

34. A third-party claim involving an insurer usually arises where a plaintiff, who has been injured by the alleged negligence of a tortfeasor, demands payment for the injury from the tortfeasor's insurer. Insurers are required by the Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance statute to promptly respond to such claims in good faith. *See* Mass. Gen. Laws ch. 176D, § 3(9)(f) (1996).

35. 673 N.E.2d 84 (Mass. App. Ct. 1996).

36. *Id.* at 89 (citations omitted).

37. *See id.* at 85-86.

38. *See id.* at 86.

39. *See id.*

40. *See id.* at 86-87.

41. *Cohen*, 673 N.E.2d at 89.

42. *See* Yeagle v. Aetna Cas. & Sur. Co., 679 N.E.2d 248 (Mass. App. Ct. 1997); *see also infra* notes 52-61 and accompanying text.

43. *Cohen*, 673 N.E.2d at 86.

44. *See id.*

45. 1989 Mass. Acts 580; *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

46. *See Cohen*, 673 N.E.2d at 89.

47. *See* Boyle, *supra* note 3, at 14.

48. *See supra* note 1 and accompanying text.

49. *See Cohen*, 673 N.E.2d at 89. The award of the policy limits as Chapter 93A damages under similar circumstances was unequivocally rejected by pre-Amendment cases. *See, e.g.*, Bertassi v. Allstate Ins. Co., 522 N.E.2d 949, 953 (Mass. 1988); Wallace v. American Mfrs. Mut. Ins. Co., 494 N.E.2d 35, 37 (Mass. App. Ct. 1986).

The *Cohen* case did not explain how the award of the policy limits as actual damages was required by the Amendment. The lack of reasoning in *Cohen* makes it difficult to discern how it should be applied as precedent. This is illustrated by a recent superior court decision that cited *Cohen* in support of an award of the policy limits as Chapter 93A actual damages before the underlying tort case had been tried. *See* Bruning v. Welch, 7 Mass. L. Rptr. (Mass. L. Book Co.) 229, at 231 (September 15, 1997).

50. *See Cohen*, 673 N.E.2d at 90.

51. *See Wallace*, 494 N.E.2d at 37; Trempe v. Aetna Cas. & Sur. Co., 480 N.E.2d 670, 676 (Mass. App. Ct. 1985).

52. 679 N.E.2d 248 (Mass. App. Ct. 1997). In *Yeagle*, a Superior Court judge awarded single Chapter 93A damages against an insurer after the insurer had paid a tort judgment of $94,015. *See id.* at 249.

53. *See id.* at 249.

54. *See id.* at 250. Aetna had offered $30,000 to settle a soft tissue injury claim with chiropractic fees constituting the bulk of the medical bills. *See id.* at 249. Defense counsel had advised the insurer that the offer was reasonable, but that a conciliator "evaluated" the case at $70,000. *Id.* It is unknown if the insurer objected to the use of a conciliation evaluation as evidence in the Chapter 93A case. Presumably, a conciliator's opinion should be inadmissible in such an action. *See* Mass. Gen. Laws ch. 233, § 23C (1996) (stating that mediator communications are not admissible as evidence).

Following the jury verdict of $94,000 (including interest), the Chapter 93A action against the insurer was tried and the judge ruled that the insurer had *not* acted wilfully or knowingly, but had failed "`to effectuate a "prompt, fair and equitable" settlement.'" *Yeagle*, 679 N.E.2d at 249 (quoting Mass. Gen. Laws ch. 176D, § 3(9)(f) (1996)). The judge determined that "the measure of damages to the plaintiff is established by [the Amendment] . . . [which] provides for recovery in the amount of the judgment which the plaintiff ultimately recovered on the claim itself, to wit: $94,015.00." Yeagle v. Aetna Cas. & Sur. Co., 3 Mass. L. Rptr. (Mass. L. Book Co.) 201, at 204 (Feb. 27, 1995).

55. *See Yeagle*, 679 N.E.2d at 250-52.

56. *See id.* at 251.

57. *See id.* at 250.

58. 1989 Mass. Acts 580 (emphasis added); *see also* Mass. Gen. Laws ch. 93A, §§ 9(3), 11 (1996).

59. *See Yeagle*, 679 N.E.2d at 250.

60. *Id.* at 251.

61. Cohen v. Liberty Mut. Ins. Co., 673 N.E.2d 84, 89 (Mass. App. Ct. 1996).

62. *Yeagle*, 679 N.E.2d at 251.

63. *Compare Cohen*, 673 N.E.2d at 89 *with Yeagle*, 679 N.E.2d at 251.

64. 676 N.E.2d 1134 (Mass. 1997).

65. *See id.* at 1138. The Massachusetts Superior Court judge in this case also awarded interest and attorney fees in the amount of $150,000. *See id.*

66. *See id.* at 1136.

67. *See id.* at 1136-37.

68. *See id.* at 1137.

69. *See id.*

70. *See Clegg*, 676 N.E.2d at 1138.

71. Clegg v. Butler, No. 93-0640, slip op. at 16 (Middlesex Sup. Ct. Jan. 24, 1995).

72. *Clegg*, 676 N.E.2d at 1142-43.

73. *See id.* at 1142.

74. *See id.*

75. *Id.* Implicit in the *Yeagle* and *Clegg* decisions is the notion that the judgment amount, if any, will be the multiple damage base even if the damages caused by the insurer would be for a higher amount. Neither case addressed that issue, or the issue of whether lost interest should be awarded in addition to the judgment amount. That issue was raised in the Federal District Court case of *Brandley v. United States Fidelity & Guar. Co.*, 819 F. Supp. 101, 106-09 (D. Mass. 1993), *vacated and withdrawn*, No. CIV.A.91-12875-MA, 1993 WL 327683 (D. Mass. Aug. 10, 1993). For reasons unclear in the record, the court withdrew the opinion after publication. The claim against the insurer was based on its failure to make a reasonable settlement offer on the motor vehicle tort action against its insured. *See id.* at 102-03. The tort action was settled for $84,000 on the first day of trial, and an agreement for judgment was entered. *See id.* at 103. The plaintiff then tried the Chapter 93A claim against the insured in Federal District Court. *See id.*

On damages, Judge Mazzone ruled that, pursuant to the Amendment, the amount of "actual damages" to be awarded was the amount of the "judgment" on the underlying tort action. *Id.* at 106, 109. He determined that under the Amendment, no causal relationship needed to be proven between the conduct of the insurer and the Chapter 93A damages. *See id.* at 109. He construed the Amendment to provide that actual damages were the amount of the tort judgment *and* the lost interest on the unpaid settlement money. *See id.* He also found that the insurer acted wilfully in dealing with the claim and awarded double the $102,480 judgment amount in actual damages. *See id.*

Judge Mazzone combined the amounts of compensatory damages measured by the award of the "judgment." *Id.* This is the worst case for the insurer which was required to pay both damages measured by the judgment against its insured, and damages directly caused by the insurer. Moreover, the Chapter 93A award was in addition to the tort judgment which had already been paid by the insurer from the policy. *See id.*

Brandley was vacated and withdrawn by the District Court on August 10, 1993. *See* Brandley v. United States Fidelity & Guar. Co., 1993 WL 327683 (D. Mass. 1993). The *Cohen* court noted that "reliance on it is misplaced." Cohen v. Liberty Mut. Ins. Co., 673 N.E.2d 84, 89 n.4 (Mass. App. Ct. 1996).

76. Mass. Gen. Laws ch. 93A, § 9(3) (1996).

77. *Id.*

78. *See id.*

79. *Id.*

80. *See* Yeagle v. Aetna Cas. & Sur. Co., 679 N.E.2d 248, 250-52 (Mass. App. Ct. 1997).

81. *See* Mass. Gen. Laws ch. 93A, § 9(3) (1996).

82. *See id.*

83. *See id.* § 9(4).

84. *See id.* § 9(3).

85. *See* Clegg v. Butler, 676 N.E.2d 1134, 1142 (Mass. 1997).

86. *Yeagle*, 679 N.E.2d at 251.

87. The term "prompt" is not defined in Massachusetts General Laws Chapter 176D, section 3, and is a fact issue. At least one court has ruled that a response to a demand letter over 30 days is not a *per se* Chapter 93A violation. *See* Forcucci v. United States Fidelity & Guar., 11 F.3d 1, 2 (1st Cir. 1993) (stating that a response on the 31st day is not a *per se* violation of Chapter 93A).

88. Mass. Gen. Laws ch. 176D, § 3(9)(f) (1996) ("Failing to effectuate prompt, fair and equitable settlements . . . .").

89. *See id.* § 3(9).

90. *Id.* ch. 93A, § 9(3).

91. *Id.*

92. *See* Clegg v. Butler, 676 N.E.2d 1134, 1142 (Mass. 1997) (holding the Amendment inapplicable to settlements); Bonofiglio v. Commercial Union Ins. Co., 576 N.E.2d 680, 684 (Mass. 1991) (holding that the Amendment is not applicable to arbitration awards).

93. *See Clegg*, 676 N.E.2d at 1142.

94. *See* Mass. Gen. Laws ch. 175, § 113L (1996).

95. *See* Yeagle v. Aetna Cas. & Sur. Co., 679 N.E.2d 248, 250-51 (Mass. App. Ct. 1997).