

## The Elimination of Causation in 93A Actions Against Insurers

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Chapter 580 of the Acts of 1989 (hereinafter the "Amendment") effected an amendment to sections 9 and 11 of Chapter 93A which significantly alters the calculation of damages recoverable by a plaintiff in a 93A action. This Amendment, however, was poorly drafted and raises significant questions as to the issue of causation and the issue of retroactive application. The following article is in response to a recent *Boston Bar Journal* article by a proponent of the Amendment.

### I. Legislative Background

Chapter 580 began as a late filed petition in the spring of 1989. Known as House Bill 6014, it was passed by the House of Representatives and the Senate during Thanksgiving week 1989 and signed by the acting Speaker of the House and the acting Senate President. There were no recorded votes on the Amendment and no notice to either the defense Bar or to the insurance community that this legislation was pending. The Amendment contained the benign title "An Act Further Regulating Damages Under the Consumer Protection Act" which did not raise suspicions about the enormous changes that it was designed to achieve.

Sections 9 and 11 of G.L. c. 93A permits injured plaintiffs to recover for "ac-

tual damages" for violations of the Consumer Protection Act and two or three times such amount if there is a willful or knowing violation.

Chapter 580 provides that "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."

The legislative file for House Bill 6014 contained a "fact sheet" prepared by its sponsor, Representative Vernon, which provided the following inaccurate summary of how courts had been applying treble damages in 93A cases:

This bill has been filed in reaction to confusion over treble damages in such cases. Courts have been multiplying the judgment three times and then adding the original amount to that figure, while others have been simply awarding the judgment multiplied three times. This bill clarifies the language so that the intent is clearer that the final award in such cases is to only be the judgment multiplied by three.

In view of the numerous appellate decisions published prior to the filing of this Amendment, which unambiguously set forth the method of calculating actual damages in 93A cases, there was no "confusion" between the courts at all and there were no decisions supporting the claims in Representative Vernon's "fact sheet" that the "judgment" was being multiplied for 93A damage awards. Accordingly, any legislator who relied on Representative Vernon's "fact sheet" would have been totally misled on the facts.

The "fact sheet" also indicated that the purpose of the Amendment was in "reaction to" the case of *Wallace v. American Manufacturer's Mutual Ins. Co.*, 22 Mass. App. Ct. 938, 940 (1986), which the Amendment "corrects." In the *Wallace* case an insurer wrongfully refused to pay an automobile theft claim and the trial judge awarded two times the amount of the disputed coverage. The Appeals Court reversed and held that "actual" damages recoverable under G.L. c. 93A, sec. 9 were not measured by the insurance coverage amount which was denied but rather by the loss of the

use of the wrongfully withheld amounts, together with other related costs.

In addition to the *Wallace* case, the Amendment apparently was intended to "correct" a number of other Massachusetts appellate decisions which had consistently applied the reasoning of the *Wallace* court that there be a causal relationship between the conduct of the insurer and the damages awarded under G.L. c. 93A. Thus, in *Bertassi v. Allstate Ins. Co.*, 402 Mass. 366 (1980), the Supreme Judicial Court ruled that where the insurer had wrongfully withheld underinsured motorist coverage, the 93A actual damages were not calculated by the amount of the UM coverage which had been withheld, but rather by the loss of the use of that amount of money together with other costs.

### II. The Causation Issue

The insureds in both the *Wallace* and the *Bertassi* cases recovered the amount of the disputed coverage as a matter of contract law. In addition, both cases held that since the insured had been delayed in receiving the amount of coverage by the wrongful conduct of an insurance company, the insured was entitled to recover additional amounts for the loss of the use of the coverage amounts plus related costs and attorney's fees under the 93A cause of action. The separate damage recovery under 93A was logical and resulted in the recovery of actual damages which were proximately caused by the conduct of the insurer for both first-party and third-party claims.

By providing that in all 93A cases the measurement of "actual damages" shall be the amount of the underlying judgment, the Amendment has created an arbitrary formulation and has eliminated the element of a causal nexus between the damage award and the conduct of the insurer. Consider, for example, the case of an insurer that disputes the amount of a property fire loss with its insured and offers to pay \$70,000 against a demand of \$90,000. The insured eventually recovers a judgment in the amount of \$80,000 on the property loss and then persuades a 93A factfinder that the insurer's offer was not reasonable and thus a violation of 93A. Under the cases construing Chapter 93A prior to the Amendment, the insured would be entitled to actual damages measured by

the loss of the use of that \$80,000 for the time since the claim was denied plus costs and attorney's fees. That result is consistent with traditional common law notions of causation under both tort and contract law where the injured party is placed back in the position that he would have been in but for the conduct of the defendant.

Under a liberal construction of the Amendment, however, the insured would recover \$80,000 on his contract judgment and another \$80,000 on his 93A judgment plus attorney's fees and multiples of \$80,000 if there was a willful or knowing violation of chapter 93A. To recover an additional \$80,000 for the 93A claim does not compensate the insured for actual damages caused by the insurer. That figure has no logical relationship to the conduct of the insurer or to the damages caused by the conduct of the insurer. \$80,000 is simply the fortuitous amount of the fire loss that the insured is entitled to recover under his insurance contract. The element of causation is entirely missing from this calculus since it mat-

and independent right to recover under 93A against the insurer for any damages caused by an unreasonable settlement offer.

If the plaintiff recovers a judgment of \$75,000 for his broken leg, he has been fully compensated for the broken leg and fully compensated for the conduct of the only party that caused him to have a broken leg. Before the Amendment to chapter 93A his remedy against the insurer would be for actual damages caused by the loss of use of insurance coverage applicable to the broken leg claim. The most that the plaintiff ever reasonably expected to recover would be the fair amount of compensation for his broken leg plus the value of the use of that compensation money from the date when he first made his claim. He has no other compensable damages under any common law principle of causation.

Under the Amendment, however, the tort plaintiff would now be entitled to a judgment for the broken leg plus the same additional judgment amount on the 93A claim. The absence of causation

If a statute eliminated the element of proximate causation for common law tort actions, would anyone argue that such a change did not affect the substantive rights of defendants? A statute so offensive to traditional notions of liability clearly affects substantive rights and, therefore, the Amendment should be applied only prospectively.

#### IV. Conclusion

This Amendment does not further any consumer protection purpose and will undoubtedly ensure that for every disputed tort or coverage claim there will be a corresponding 93A claim. There is no such thing as a "free lunch" and the costs of this new punitive damages remedy will be passed through to insureds by increased premiums. There is no evidence that the Legislature wanted to provide an additional recovery of punitive damages under Chapter 93A, or to deny the 93A factfinder discretion to determine the amount of actual damages in relation to the conduct of the insurer.

During the last legislative session a bill

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ters not what the offer of the insurer was or whether the insurer had withheld the disputed coverage for one day or for ten years.

To provide damages in an amount hugely disproportional to the injury caused by the conduct of the insurer is not compensating the insured for his "actual" damages at all, but is rather imposing a form of punitive damages. To be sure, this Draconian result serves to deter and punish the insurer, but this was not the purpose of the 93A actual damages provision since multiple damages were specifically provided in the statute for this purpose.

The unfairness caused by the Amendment is even more pronounced when applied to third-party claims. Consider, for example, the plaintiff in an automobile tort action who demands \$50,000 for a broken leg injury with disputed liability, and receives an offer of \$45,000 from the insurer. The plaintiff would have the right to recover a tort judgment against the insured automobile driver for the amount of his bodily injury damages. The plaintiff would also have a separate

is obvious since the unreasonable offer by the insurance company did not cause him a \$75,000 loss and did not impair his right to recover a judgment for his broken leg in his tort action.

#### III. Retroactivity

It is fatuous to suggest that a statutory change which enormously increases the damage exposure to insurers by eliminating the requirement of causation is a procedural adjustment only and affects no substantive rights. Generally, statutes are construed to operate prospectively unless a contrary legislative intent is clearly shown. This is especially so where a statute affects substantive rights.

Here the Amendment changes the right of the insurer to pay damages only where the insurer's conduct has caused the damage. This causation right was one of the two central defenses to 93A claims. Under the Amendment, however, even if there has been an unintentional 93A violation, the insurer is liable to pay amounts based on judgments resulting from the conduct of persons wholly beyond the insurer's control.

was filed by Representative Michael W. Morrissey and Attorney Lawrence Boyle of Morrison, Mahoney & Miller to restore the element of causation in 93A actions. It is expected that the bill (H. 5783) will be refiled and heard again by the Judiciary Committee during the 1991 session and should be supported by members of the Bar.

#### NOTES

1. See e.g. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 850 (1983); *Shapiro v. Public Service Mut. Ins. Co.*, 19 Mass. App. 648 (1985); *Trembe v. Aetna Casualty & Sur. Co.*, 20 Mass. App. Ct. 448, 451 (1985).

2. The term "judgment" is not defined and presumably has the meaning provided by the Massachusetts Rules of Civil Procedure. This would apparently exclude arbitration awards resulting from underinsured motorist coverage disputes and reference awards under G.L. c. 175 resulting from disputed property fire losses.

It is unclear if the amount of the "judgment" must be paid a second time by an insurer on the 93A claim if the judgment on the underlying tort or insurance coverage claim has been fully paid. By providing that actual damages shall be the amount of the judgment, the language of the Amendment supports the construction that the payment of the judgment has no bearing on the calculation of 93A damages.