COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2003-01212-B

ODIN ANDERSON & Others,[1]

Plaintiffs,

vs.

AMERICAN INTERNATIONAL GROUP, INC. & Others,[2]

Defendants.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

Introduction

This is an action brought pursuant to M.G.L. c. 93A, §§ 2 and 9, and M.G.L. c. 176D, § 3, based on the alleged failure of the Defendants, as insurers of Partners Healthcare, to "effectuate prompt, fair and equitable settlement" of the Plaintiffs' claims arising out of a 1998 accident in which a Partner's shuttle bus struck Plaintiff Odin Anderson. The Court tried the case without a jury for two weeks in September 2013. The Plaintiffs and the Defendants thereafter made extensive post-trial submissions to the Court, the last of which were received in late December 2013. The following constitute the Court's findings of fact, rulings of law and order for judgment after trial and upon consideration of the post-trial submissions of the parties.

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[1] Kerstin Anderson and Katarina Anderson ppa Odin Anderson.

[2] National Union Fire Insurance Company of Pittsburgh PA, American International Group Technical Services, Inc. and AIG Claims Services, Inc. (collectively, the "Defendants"). All of the Defendants are subsidiaries and/or affiliates of American International Group, Inc., which was dismissed as a named defendant, by agreement of the parties, during trial in September 2013.

Findings of Fact[3]

1. The Accident.

On the afternoon of September 2, 1998, Plaintiff Odin Anderson attempted to walk across Staniford Street in Boston, Massachusetts, near the intersection of Cardinal O'Connell Way. The weather was bright and clear, the road surfaces dry. Mr. Anderson, a practicing attorney, was returning to his office from an extended lunch that included the consumption of alcohol. The only independent witness who observed Mr. Anderson prior to his accident, however, saw him walk across Staniford Street "briskly" and with no apparent difficulty.[4]

Staniford Street is a busy, multilane street divided by a median strip that runs north to south, extending from Cambridge Street at its southern end to the TD Garden at its northern terminus. Cardinal O'Connell Way intersects and forms a "T" with Staniford Street on its west side just north of Cambridge Street. The intersection is not controlled by traffic lights and has clearly-marked pedestrian crosswalks.

Mr. Anderson exited the sidewalk on the east side of Staniford Street in or near the crosswalk and began walking west towards the median strip. At the same moment, a large shuttle bus owned by Partners Healthcare ("Partners") and operated by Norman Rice, a Partner's employee, was turning onto the northbound side of Staniford Street from Cardinal

[3] These findings of fact are based upon the Court's consideration of all of the evidence presented at trial. In appropriate instances, the Court makes reference to specific testimony or exhibits in order to identify the evidentiary basis for its findings. To the extent that the Court makes no reference to a particular trial exhibit or to the testimony of particular trial witness, the Court finds either that the content of such exhibit or testimony was not genuinely disputed, was not persuasive or credible, or was not germane to the issues to be decided.

[4] Mr. Anderson's passage across Staniford Street was observed by Robert Kissell, a third party witness. Mr. Kissell testified in the Andersons' underlying personal injury action that, even though Mr. Anderson's blood alcohol level later was determined to be approximately 0.14 percent, he "was walking across Staniford Street at a brisk pace towards the side of the street on which Mr. Kissell's van was parked." Trial Ex. 44, p. 2. Mr. Kissell steadfastly denied that Mr. Anderson "was running across the street or that he at any time staggered or crouched down." *Id.*

O'Connell Way. Mr. Rice brought his shuttle bus to a stop halfway across Staniford Street, turned his head to his right to observe the vehicles traveling northbound on Staniford Street, and waited for an opening in traffic to enter the northbound lanes. When an opening appeared, Mr. Rice began making a left turn onto Staniford Street without looking where his shuttle bus was headed. Unfortunately, the bus was headed directly for Mr. Anderson, who was just about to step onto the traffic island in the middle of Staniford Street. The bus collided with Mr. Anderson at a location in the left-most travel lane approximately 2-3 feet from the traffic island and just outside of the crosswalk.

The bus that hit Mr. Anderson weighs in the vicinity of thirteen tons. According to witnesses, Mr. Anderson's body came to rest approximately five to ten feet from the point of impact. As a result of the collision, Mr. Anderson sustained severe and life-threatening injuries to his head and stopped breathing. A group of physicians who were riding on the shuttle bus when the accident occurred administered CPR to Mr. Anderson, revived him and cared for him until EMTs arrived on the scene. The EMTs transported Mr. Anderson to the intensive care unit at Massachusetts General Hospital ("MGH"), where he ultimately was diagnosed with a skull fracture and multiple resulting intracerebral hemorrhages.

Mr. Rice left the scene of the accident before the police arrived. Several hours later, he travelled to a Boston Police station with a representative from Partners to provide his own report regarding the accident. Mr. Rice eventually was cited by the Boston Police for hitting a pedestrian in a crosswalk, a charge that he did not contest.

Mr. Anderson remained at MGH from the date of the accident until he was transferred directly to Braintree Hospital for rehabilitation on September 11, 1998. Mr. Anderson was

discharged from Braintree Hospital approximately eight days later, but he continued to receive regular treatment for the physical and psychological effects of his injuries, which include severe headaches, memory deficits, cognitive difficulties, dizziness, lost sense of smell, sleep disorders and depression, for more than a year afterwards.

2. AIGCS' Initial Investigation and Evaluation of the Accident.

As of September 1998, Partners and Mr. Rice were insured under a primary and excess auto insurance policy issued by Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union").[5] At all relevant times, claims under National Union primary polices were handled by AIG Claims Services, Inc. ("AIGCS"), and claims under National Union excess policies were handled by AIG Technical Services, Inc. ("AIGTS" or, collectively with AIGCS, the "Defendants").

The day after the accident, September 3, 1998, Partners notified AIGCS of the shuttle bus accident involving Mr. Anderson. AIGCS assigned Steven Fulton, a lawyer and a "director" in its Complex Casualty Unit, to adjust the claim. Mr. Fulton, in turn, promptly assigned Mark Peltz, an in-house investigator at AIGCS, the task of obtaining statements from Mr. Rice and any other witnesses to the accident.

Mr. Peltz conducted a tape-recorded interview of Mr. Rice at a Partner's facility in Boston on October 16, 1998 (*i.e.*, approximately six weeks after the accident). AIGCS' written transcription of Mr. Rice's recorded statement was marked at trial as Exhibit 14, and a copy of the audio tape was marked as Exhibit 14A. During the course of the interview by Mr. Peltz, Mr. Rice stated, in part, that:

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[5] The coverage limit of Partners' primary auto insurance policy with National Union was $1,000,000, and the limit of its excess policy with National Union was $10,000,000.

- The accident occurred at approximately 2:40 p.m. on September 2, 1998 (Trial Ex. 14, p. 4);

- The weather conditions at the time of the accident were "[c]lear," "[d]ry" and "[s]unny" (*Id.*, p. 5);

- The headlights on Mr. Rice's shuttle bus were off when the accident occurred (*Id.*, p. 6);

- The accident occurred while the bus was making a left-hand turn onto Staniford Street from Cardinal O'Connell Way (*Id.*, p. 8);

- Mr. Rice was looking to his right up Staniford Street just prior to the moment of impact "to see if there were any vehicles coming down" Staniford Street (*Id.*, pp. 13-14);

- Mr. Rice never saw Mr. Anderson before the moment of impact (*Id.*, pp. 10-11);

- Mr. Rice had no idea where Mr. Anderson had come from, or the direction in which Mr. Anderson was headed just prior to the accident (*Id.*, pp. 11-12);

- At the moment of impact, Mr. Anderson was "three-quarters of the way across" the left-most travel lane on the Northbound side of Staniford Street, "about three feet" from the traffic island (*Id.*, pp. 11-12);

- Immediately after the impact, Mr. Anderson "just ... went right down on the ground and ... slid down the road" (*Id.*, p. 13);

- Mr. Rice made no attempt to avoid the collision with Mr. Anderson before it occurred because he "didn't see [Mr. Anderson] prior to the impact" (*Id.*); and

- Mr. Rice understood all of Mr. Peltz's questions, and his answers to Mr. Peltz's questions were "the truth to the best of [his] knowledge" (*Id.*, p. 18).

On December 1, 1998, Mr. Peltz interviewed another Partner's employee, Tony Hinds, about the accident involving Mr. Anderson. Mr. Hinds was driving a second, smaller Partners shuttle bus immediately behind Mr. Rice's vehicle when the accident occurred. AIGCS' written transcription of Mr. Hinds' recorded statement was marked at trial as Exhibit 17, and a

copy of the audio tape was marked as Exhibit 17A. During the course of the interview by Mr. Peltz, Mr. Hinds stated, in part, that:

- He (*i.e.*, Mr. Hinds) had a "clear" view of Mr. Rice's shuttle bus in the moments leading up to the accident (Trial Ex. 17, p. 4);
- The accident occurred while Mr. Rice's bus was making a left-hand turn onto Staniford Street (*Id.*, pp. 4-5);
- Before Mr. Rice's bus completed its turn onto Staniford Street, the bus came to an "abrupt" stop, with the rear of the bus blocking one of the southbound lanes of Staniford Street and the front wheels of the bus resting "right on the crosswalk" running across Staniford Street (*Id.*, pp. 5-6);
- Immediately after the accident, Mr. Hinds observed a man lying on the road "about five to seven feet away" from the front of Mr. Rice's bus (*Id.*, p. 6);
- Mr. Rice told Mr. Hinds shortly after the accident that "he thought he had heard a little bump and the next thing he noticed he saw some guy on the floor, that's when he slammed on his brake" (*Id.*, p. 8); and
- Mr. Hinds understood all of Mr. Peltz's questions, and his answers to Mr. Peltz's questions were "the truth" to the "best of [his] knowledge" (*Id.*).

Mr. Peltz sent Mr. Fulton a written summary of his investigation, including the recorded statements of Mr. Rice and Mr. Hinds, on or about December 12, 1998. (Trial Ex. 18). Mr. Peltz's summary states, in part, that when Mr. Rice,

> first noticed the claimant [*i.e.*, Mr. Anderson], he stated that he was less than 1 foot from the bus. The claimant was outside of the crosswalk, in the left lane and about 3 feet from the island.

Trial Ex. 18, p. TS00005.

Mr. Peltz's investigation summary further states, "I will be forwarding under separate cover statement tapes, photos and the incident report." *Id.*, p. TS00006. Mr. Peltz's actions in forwarding his investigation materials to Mr. Fulton were consistent with AIGCS' usual business practice of storing all such materials in its claim file. It also was AIGCS' usual

business practice to have written transcripts created of all witness statements taken by its internal investigators, and to store the transcripts in the appropriate claim file. AIGCS and Mr. Fulton followed those practices in this instance.[6]

Mr. Fulton confirmed the information that Mr. Peltz had obtained from Mr. Rice regarding how Mr. Anderson's accident occurred through his own direct discussions with Mr. Rice. Mr. Rice told Mr. Fulton that he was not looking where his shuttle bus was headed in the moments before the accident occurred, that the bus began moving forward before Mr. Rice looked to his left, that Mr. Rice did not see Mr. Anderson crossing Staniford Street before his vehicle struck Mr. Anderson, and that the bus hit Mr. Anderson when he was "right next to" the traffic island in the middle of Staniford Street.

Based on these facts and others, Mr. Fulton determined in late 1998 or early 1999 that no additional liability investigation concerning Mr. Anderson's accident was necessary; he was satisfied with Mr. Peltz's work. Mr. Fulton determined that Partners and Mr. Rice had "no viable liability defense," and he concluded that Partners and Mr. Rice were "much more likely" to be found responsible for the September 1998 accident than Mr. Anderson. He decided, as a result, to obtain Mr. Anderson's "medicals" (*i.e.*, medical records and bills documenting the nature and extent of Mr. Anderson's injuries), then pursue an out-of-court

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[6] To the extent that Mr. Fulton testified to the contrary at trial (see Trial Transcript ("Trial Tr."), September 24, 2013, at 63-66), the Court finds his testimony on the point to be not credible. Indeed, it appears essentially uncontested in this proceeding that AIGCS and/or AIGTS retained copies of Mr. Rice and Mr. Hinds' recorded statements somewhere in their claim file after 1998, and that the statements were readily available to AIGCS and AIGTS personnel if and when they wanted them. See Trial Tr., Sept. 18, 2013, p. 54 (Testimony of Attorney H. Charles Hambelton that defense counsel "had to get [the Rice and Hinds statements] from AIG" during trial in June 2003); see also Trial Ex. 2, p. 146 (AIGTS claims notes entry describing the "developments at trial" on Wednesday, June 18, 2003, and stating, in part, "Judge Connolly ordered that defense counsel make an effort to locate the tapes of the [Rice and Hinds] interviews, and I later learned that the tapes were located.").

settlement with Mr. Anderson directly. As Mr. Fulton stated in note that he made in AIGCS' claim file in the spring of 1999,

> Mr. Anderson has apparently been complaining of memory difficulties.... I have a 175K indemnity reserve outstanding. There is no doubt that this reserve will be insufficient in this case. I don't believe that any viable liability defense exists. We could argue some comparative. We have an attorney who from the bills has had some very serious treatment and appears to be complaining about memory problems. I suspect that we will get a very large demand in this case.

Trial Ex. 20, p. 61.

For the remainder of 1999, Mr. Fulton and AIGCS were content to collect copies of Mr. Anderson's mounting medical records and bills (which were being forwarded periodically to Mr. Fulton by Ginny Guarino, a paralegal at Mr. Anderson's law office) and to await an opportunity to have a meaningful settlement discussion with Mr. Anderson. As late as October 1999, Mr. Fulton expressed (internally, at least) surprise regarding the slow pace of Mr. Anderson's recovery and his lack of a prompt settlement demand. Mr. Fulton wrote,

> We know we have about $52K in medicals involving time at Braintree Rehab so we are probably looking at a serious injury. We are passed (*sic*) one year from date of injury. I am getting the feeling that Mr. Anderson is back at work full time. Without medicals or income records I am not going to change the reserve at this time. I told Ginny that after I see the medical records I would like to talk to Mr. Anderson about his claim.
>
> I will wait two weeks. If I do not get the promised medicals I will send authorizations for at least MGH and Braintree and see if the claimant will sign.
>
> I would think that the claimant/attorney would be pushing to make a recovery here. The recovery would be tax free so that could not be the reason for the slowness of the response.

Trial Ex. 1, p. 60.

No out-of-court settlement of Mr. Anderson's claim ever occurred. Rather, what happened over the ensuing nine years presents a disturbing tale of irresponsible and overly-aggressive defense work on the part of AIGCS, Partner's primary insurer, AIGTS, Partner's excess insurer, and certain of the attorneys retained by AIGCS and AIGTS to resist the accident-related claims that eventually were asserted by Mr. Anderson and members of his family. The improper conduct of AIGCS, AIGTS and their servants -- all of which was either known to, or easily discoverable by AIGCS and AIGTS personnel -- included the creation of an alternative, more-defensible accident scenario based primarily on fictitious evidence and wishful thinking; the suppression of crucial evidence that ran contrary to the defense's carefully crafted alternative scenario; and the impermissible manipulation of critical witness testimony for the benefit of the defense.

As a consequence of these and other improper actions by Defendants AIGCS and AIGTS and their servants, which are discussed more fully below, Mr. Anderson and his family were forced to participate in a lengthy, hard-fought trial of their personal injury claims in 2003, to endure a protracted appeal of the resulting verdict in their favor, and to pursue this action under M.G.L. c. 93A and 176D in order to fully vindicate their rights.

3. AIGCS Changes Course and Adopts an "Aggressive" Defense Strategy.

AIGCS' defense strategy changed dramatically after Mr. Anderson retained Richard E. Brody, an experienced personal injury attorney, to pursue his claim. Mr. Brody reached out to Mr. Fulton in early February 2000, introduced himself as legal counsel for Mr. Anderson and his family, and notified Mr. Fulton that a settlement package -- including a demand that likely would exceed Partners' $1 million primary insurance coverage -- would be forthcoming.

Mr. Brody told Mr. Fulton at the same time that it "would take [him] a while" to assemble the settlement package. Mr. Brody followed up his telephone call to Mr. Fulton with a letter, dated February 22, 2000, that demanded, among other things, information concerning "any excess or umbrella coverage for the vehicle involved in [Mr. Anderson's] accident" and a copy of Mr. Rice's "operator's report." Trial Ex. 22, p. 1.

AIGCS personnel were familiar with Mr. Brody from prior experience. Mr. Fulton was warned that Mr. Brody is "competent" and "aggressive." He heard another ongoing AIGCS matter involving Mr. Brody described as a "slugfest" in which Mr. Brody was "coming on with a scortched (*sic*) earth policy." Trial Ex. 1, p. 56. Mr. Fulton understood from his discussions with others at AIGCS that Mr. Brody likely would be "difficult to negotiate with."

Mr. Brody's appearance as counsel for Mr. Anderson ultimately set off a "flurry of activity" on the part of AIGCS and Partners personnel. Trial Ex. 1, p. 59. Partners "demanded aggressive handling" of Mr. Anderson's claim, and Mr. Fulton reacted by retaining Attorney Daniel P. Gibson of the law firm Gibson & Behman, P.C. to lead the defense in August 2000, even though Mr. Fulton still believed Partners' liability to be reasonably clear.[7] Mr. Fulton justified his decision to retain outside counsel in AIGCS' claim file, noting that "it appears that this [case] will be a struggle" and that Mr. Gibson and his firm would bring a "level of aggresivness (*sic*) and thoroughness to this case to have a level playing field." Trial Ex. 1, p. 59.

[7] Mr. Gibson was indefinitely suspended from the practice of law for reasons unrelated to the Anderson matter in July 2011. Gibson & Behman, P.C. was dissolved at or around the same time.

Mr. Gibson first began working on the Anderson matter on or about August 8, 2000. Over the next several weeks, he became familiar with the case by meeting with Mr. Fulton and Partners' risk manager, Mark Hicks, by personally interviewing Mr. Rice and Mr. Hinds at Partners' offices, by visiting the site of the accident, and by reviewing various materials in AIGCS' claim file, including Mr. Peltz's tape-recorded interviews of Mr. Rice and Mr. Hinds. Mr. Gibson promptly told Mr. Fulton that Mr. Peltz's investigation was "possibl[y] compromise[d]" and recommended that AIGCS retain an outsider investigator, Thomas Papineau, and an accident reconstructionist, Lieutenant Robert Benanti, to assist in the defense effort.[8] Mr. Fulton approved Mr. Gibson's request. Trial Ex. 50, p. 1. Mr. Papineau and Lieutenant Benanti began working on the matter almost immediately.

Mr. Fulton, Mr. Gibson, Mr. Papineau and perhaps others met at AIGCS' offices in September 2000 to discuss their preliminary insights regarding Mr. Anderson's accident and to devise a defense strategy. The decision was made at or about that time to aggressively fight Mr. Anderson's claim instead of pursuing a prompt settlement, as had been AIGCS' previous plan. Mr. Fulton explained the dramatic shift in strategy in his contemporaneous claim file notes, in part, as follows,

> [t]his case had the appearance of a probably (*sic*) liability case. The insured bus struck an attorney in the street. The insured was concerned about the case and the fact that nothing seemed to be happening. I had several contacts with the plaintiff atty over the past 9 months. I had been promised a 21 page letter with a demand but it never came. The plaintiff attys only real concern so far has been uncovering the excess policy. That tells me that at some point we will get a demand which exceeds the primary

[8] At the time Lieutenant Benanti worked as an expert witness for the defense in the Andersons' underlying personal injury action, he also was an active member of the Massachusetts State Police. Trial Ex. 134, Day 17, p. 86.

> limit..... Dan [Gibson] asked me to bring in a reconstructionist expert and an outside investigator. I agreed. We all meet (*sic*) with the insured driver at MGH and got his story. The expert and the investigator have been at work. We all met again to actually ride on the bus and get the view which the driver had. The expert is going to do some braking and acceleration tests on the bus etc. The investigator has found the identities of several doctors who were on the bus at the time of the accident. One of these has made the statement that the plaintiff appeared to be drinking. We need the details on this.... So our effort is giving us something to talk about here which is going to be very important. The doctor on the bus says the plaintiff was unconscious at the scene. I think that we may have a serious injury here.... Time will tell but right now we are getting what we need to do done. We will have high legal, investigative, and expert expenses but it is going to be very necessary in this case to save indemnity money and to satisfy our insured.

Trial Ex. 1, p. 59.

4. <u>The Defendants Employ Improper Defense Tactics.</u>

Mr. Brody eventually sent Mr. Fulton and AIGCS a comprehensive and detailed settlement package on behalf of Mr. Anderson, his wife Kirsten, and their twelve-year-old daughter Katarina on February 13, 2001. Trial Ex. 30. Shortly thereafter, Mr. Brody presented Mr. Fulton with a five million dollar ($5,000,000) settlement demand. Trial Ex. 31. When no settlement offer was forthcoming from AIGCS, Mr. Brody and his law firm commenced a civil action against Partners and Mr. Rice in Middlesex Superior Court on May 25, 2001 (the "Underlying Action"). Mr. Gibson and Attorney H. Charles Hambelton of Gibson & Behman appeared in the Underlying Action as legal counsel for Partners and Mr. Rice.

The Underlying Action was vigorously litigated by both sides over the next two years, culminating in an eighteen day jury trial from June 10, 2003 to July 3, 2003. AIGCS, as the

primary carrier, officially controlled the defense until shortly before trial commenced, at which time AIGCS tendered its policy limits to AIGTS, the excess carrier, and AIGTS assumed control of the defense. The record establishes and the Court so finds, however, that AIGTS personnel were fully aware of, and participated in, the litigation of the Underlying Action well before AIGTS assumed direct control of the defense in early June.[9]

The aggressive defense strategy that AIGCS and Gibson & Behman elected to pursue in the Underlying Action, and that AIGTS endorsed, employed at least three tactics that were dishonest and highly improper, but vital to the success of the strategy. Briefly summarized, the dishonest and improper were as follows:

A. *Suppressing the Results of Mr. Peltz's Investigation of the Accident.*

Mounting a viable defense to Mr. Anderson's claims in the face of the recorded statement that Mr. Rice gave to Mr. Peltz in the fall of 1998 presented an almost insurmountable task. As noted previously, Mr. Rice openly admitted to Mr. Peltz that, among other things, he wasn't looking where his bus was headed immediately prior to the accident; that he had no idea where Mr. Anderson came from or in which direction Mr. Anderson was traveling just prior to the accident; and that, at the moment of impact, Mr. Anderson was "three-quarters of the way across" the left-most travel lane on the Northbound side of

[9] For example, on March 16, 2001, an AIGTS claims adjustor, Yvonne Mariette, personally attended a "Settlement/Trial Committee" ("STC") meeting concerning Mr. Anderson's case that also was attended by Mr. Fulton, Mr. Gibson and Mark Hicks, Partners' risk manager, among others. The official summary of that STC meeting (Trial Ex. 37) discloses that there was an extensive discussion about the aggressive defense strategy that had been adopted by AIGCS. Ms. Mariette's own notes of the STC meeting (Trial Ex. 2, p. 204) confirm that "[t]he agreed upon plan was to continue with investigation, develop witnesses, confirm plaintiff's damages both economic and physical. Get a report from our accident reconstructionist." AIGTS' claim file notes pertaining to the Anderson matter, which extend from February 26, 2001 to January 9, 2009, were marked as Trial Exhibit 2.

Staniford Street, "about three feet" from the traffic island. Trial Ex. 127, pp. 10-12. Mr. Hinds' recorded statement also was problematic for the defense because it provided powerful confirmatory evidence that Mr. Rice simply did not see Mr. Anderson before the accident took place. Trial Ex. 128, p. 8.

AIGCS and Gibson & Behman solved the evidentiary problem posed by Mr. Peltz's investigation materials by simply suppressing those materials in the Underlying Action.[10] The Court credits Mr. Brody's trial testimony that he repeatedly requested, without success, that the Defendants in the Underlying Action produce any and all witness statements in their possession, custody or control.[11] Absolutely no mention or use was made of the Rice and Hinds statements, however, until shortly before trial in June 2003, and they were produced to the Andersons' counsel at trial (over the defendants' objections) only after their existence was inadvertently disclosed.[12]

Precisely who among the defense team in the Underlying Action was aware of and/or participated in the suppression of Mr. Peltz's investigation materials in the Underlying Action

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[10] The secrecy that surrounded Mr. Peltz's investigation materials throughout most of the Underlying Action is demonstrated by the testimony of Attorney H. Charles Hambelton, a Gibson & Behman lawyer who was deeply involved in the defense of that case and served as co-counsel for Partners and Mr. Rice at trial. Although not all of Mr. Hambelton's trial testimony in this proceeding is given similar weight by the Court, the Court does credit Mr. Hambelton's testimony that even *he* was not aware of the existence of the Peltz report and the Rice and Hinds statements until the Underlying Action went to trial in June 2003. Trial Tr., Sept. 18, 2013, p. 118.

[11] Attorney Hambelton corroborated Attorney Brody's testimony that statements by the parties and any witnesses to Mr. Anderson's accident repeatedly were requested by the plaintiffs during discovery in the Underlying Action, but not produced by the defense. Trial Tr., Sept. 18, 2013, p. 40; Sept. 19, 2013, p. 35.

[12] The existence of the Peltz investigation first was disclosed in the Underlying Action during the deposition of the defendants' accident reconstructionist, Lieutenant Benanti, in May 2003. After defense counsel refused to produce Mr. Peltz's report (which had been reviewed earlier by Lieutenant Benanti), the Court ordered the production of the report on the first day of trial in June 2003. Mr. Peltz's report disclosed the existence of the Rice and Hinds statements. The Court thereupon ordered the defendants to produce the statements as well, which they did later the same day. Mr. Anderson's counsel did not receive Mr. Rice's recorded statement, however, until shortly before Mr. Rice testified in the Underlying Action.

prior to June 2003 is unclear. Certainly Mr. Fulton (who left AIGCS in October 2001), Mr. Gibson, Mr. Papineau and Mr. Benanti knew of the existence of Mr. Peltz's report and the Rice and Hinds statements, and they undoubtedly also were aware of the fact that those materials had not been disclosed to Mr. Anderson's counsel. And certainly the Peltz report and the Rice and Hinds statements constituted important information that was readily available to any AIGCS or AIGTS employee who bothered to examine the insurance claim file pertaining to Mr. Anderson's case at any time from the fall of 1998 to June 2003.

B. *Creating an Alternative Accident Scenario Based Upon Made-Up Facts.*

Suppressing Mr. Peltz's investigation materials left AIGCS, AIGTS and defense counsel free to devise an alternative scenario to explain how Mr. Anderson's accident occurred, and they took full advantage of the opportunity. Beginning in March 2001, the internal notes and correspondence between and among AIGCS, AIGTS and defense counsel promote the proposition that Mr. Anderson "was not in the cross walk at the time of the accident, but rather running between parked cars" and, presumably, darted out in front of Mr. Rice's shuttle bus as it was turning onto Staniford Street. Trial Ex. 2, p. 204 (AIGTS file note written by Ms. Mariette on March 16, 2001). Over time, the assertion that Mr. Anderson "ran" or "rushed" out onto Staniford Street from "between parked cars" became an integral part of the defense's theory of the case and one of the principal grounds on which AIGCS and AIGTS relied in refusing to settle the Andersons' claims prior to trial. See, e.g., Trial Ex. 1, p. 53 (AIGCS file note written by Mr. Fulton, dated April 12, 2001, stating, in part, "[f]ile started out with allegation that insured operator struck claimant while crossing the street. Investigation has shown that there are some issues here re liability. Claimant not in crosswalk.

Claimant apparently not looking where going and rushing."); *Id.*, p. 46 (AIGCS file note written by Mr. Fulton's file note, dated October 18, 2001, stating, in part, "Plaintiff had come from between two parked vehicles and was 'rushing' across the street in front of the bus."); and Trial Ex. 58, p. 3 (Chapter 93A response letter, dated August 30, 2002, written by AIGCS' legal counsel and stating, in part, "[a]ccording to the evidence developed in this case, Mr. Anderson was walking with his head down and suddenly and unexpectedly stepped out in front of the shuttle bus....").

The fatal flaw in the "running between parked cars" scenario that AIGCS, AIGTS and defense counsel relied upon in the Underlying Action is that it had *no* factual basis. No witness, either before or during the trial of that action, ever testified that he or she observed Mr. Anderson "running between parked cars" immediately prior to his accident. The proposition that Mr. Anderson entered onto Staniford Street from "between parked cars" was, quite simply, a wholly made-up fact that merely reflected AIGCS, AIGTS and defense counsel's wishful thinking.

The fact that the defense's "running between parked cars" theory was not supported by any real evidence was recognized by AIGCS, AIGTS and defense counsel while the Underlying Action was being litigated. For example, Mr. Fulton admitted at trial in this case that when he reported "Plaintiff had come from between two parked vehicles and was 'rushing' across the street in front of the bus" in AIGCS' claims file on October 18, 2001, he knew of "nothing" in the available evidence which supported that assertion. Trial Tr., Sept. 25, 2013, pp. 19, 27-30. When pressed at trial to identify the basis for the defense's "running between parked cars" theory, Mr. Fulton offered only that "something like that must have been said at

the [March 2001 STC] conference, but sitting here today, I can't give you any other ... explanation." *Id.*, pp. 30-31.

Notations elsewhere in AIGCS and AIGTS' claims files further demonstrate that AIGCS and AIGTS personnel generally were aware throughout the course of the Underlying Action that the defense's "running between parked cars" theory was based on hoped-for, as opposed to actual, evidence. See, e.g., Trial Ex. 46 (AIGCS file note written by Kathy Timmons, dated October 24, 2001, stating, in part, that defense counsel "advises that this case should be defensible if the factors, as we believe them to be, are the evidence upon which a jury was asked to evaluate the liability," including that Mr. Anderson "was running between two cars – not in the crosswalk, and that the driver could not have seen him."); and Trial Ex. 65, p. CS02743 (Pre-Trial Report sent by Gibson & Behman to AIGCS in April 2003, stating, in part, "[i]t would seem more likely that the reason Mr. Rice did not observe the Plaintiff sooner is that the Plaintiff ran out into the street from between parked cars, into the path of the bus.... However, there is no direct evidence to date that the Plaintiff ran out into the street.").

AIGCS, AIGTS and defense counsel attempted to bolster their alternative scenario through the testimony of Lieutenant Benanti, their accident reconstructionist. Based on his expert analysis of "the geometry of the intersection" of Staniford Street and Cardinal O'Connell Way and the "physical characteristics" of Mr. Rice's shuttle bus, Lieutenant Benanti asserted that it was not physically possible for Mr. Anderson's accident to have occurred in the left-most lane of Staniford Street close to the traffic island due to the large turning radius of the bus, and that the point of impact had to have been closer to the middle of Staniford Street. Trial Ex. 134, Day 17, pp. 106-112, 122-128. Lieutenant Benanti's expert

analysis was offered by the defense to support the proposition that Mr. Anderson had been struck by Mr. Rice after running out onto Staniford Street from between parked cars.

In reality, Lieutenant Benanti's analysis had no greater factual basis than the rest of the defense's "running between parked cars" theory. Plaintiffs presented evidence at the trial of this action that, after the conclusion of the trial in the Underlying Action, they conducted an experiment using a shuttle bus identical to the one driven by Mr. Rice on the day of Mr. Anderson, and that the Plaintiffs' bus had no difficultly turning into the left-most lane of Staniford Street from Cardinal O'Connell Way. AIGCS and AIGTS made no effort at trial to disprove or even challenge the results of the Plaintiff's bus experiment. Accordingly, it is undisputed in this proceeding, and the Court so finds, that Lieutenant Benanti's expert analysis was simply wrong.

C. *Improperly Manipulating the Testimony of Critical Witnesses.*

Having helped to devise an alternative scenario to explain how Mr. Anderson's accident occurred, Gibson & Behman attorneys next sought to conform the testimony of the critical witnesses to that scenario. The most egregious example of defense counsel's improper manipulation of the witnesses' testimony can be seen in the deposition preparation of Norman Rice, the driver of the shuttle bus that struck Mr. Anderson. Mr. Rice was deposed in the Underlying Action on June 4, 2002. In the weeks prior to his deposition, Mr. Rice was "prepped" by Gibson & Behman attorneys C. Charles Hambelton and/or Michael Mahoney for a combined total of more than sixteen hours. Mr. Rice's preparation included a four hour "mock deposition" of Mr. Rice by Attorney Mahoney, approximately one half of which was

videotaped (the "Mock Deposition Video"). Two DVD's containing the full Mock Deposition Video were introduced in evidence at trial as Trial Exhibits 136 and 137.

The Court has reviewed the Mock Deposition Video in its entirety and finds it to be deeply disturbing. The video reveals multiple instances in which Attorney Mahoney and/or Attorney Hambelton inappropriately coached Mr. Rice to modify or completely change his testimony in material ways. Over the course of the four hour session, Attorney Mahoney and Attorney Hambelton succeeded in getting Mr. Rice to significantly revise his testimony on a range of critical issues.[13]

The distorting effect of Attorney Mahoney and Attorney Hambelton's inappropriate coaching of Mr. Rice is reflected in Mr. Rice's actual testimony in the Underlying Action. The version of Mr. Anderson's accident that Mr. Rice presented at his deposition in June 2002 and at trial in June 2003 was materially different from the version of events that Mr. Rice gave to Mr. Peltz and Mr. Fulton in the fall of 1998. Some, but not all, of the significant differences between Mr. Rice's prior statements and his deposition and/or trial testimony include:

- Mr. Rice testified that, immediately prior to striking Mr. Anderson, he was "looking to [his] left, going down Staniford Street, to make sure everything was clear to keep going" (see Trial Ex. 56, p. 39; see also Trial Ex. 134, Day Nine, p. 103), whereas Mr. Rice told Mr. Peltz and Mr. Fulton in 1998 that he was looking to his right up Staniford Street just prior to the moment of impact "to see if there were any vehicles coming down" Staniford Street (Trial Ex. 127, pp. 13-14);

[13] For example, when Attorney Mahoney first asked Mr. Rice at his mock deposition "Did you have your headlights on?" Mr. Rice replied, without hesitation, "No." Trial Ex. 136 at elapsed time 1:02:20. That answer was entirely consistent with the statement that Mr. Rice gave to Mr. Peltz in 1998. Trial Ex. 127, p. 6 ("Q [Y]ou didn't have your headlights or your wipes on? A No, I didn't."). The participants in Mr. Rice's mock deposition then stopped the video camera for approximately thirty minutes. Shortly after returning from the break, Attorney Mahoney again asked Mr. Rice "Your headlights, were they on?", to which Mr. Rice replied, for the first time, "Yes." *Id.* at elapsed time 1:05:15. Mr. Rice repeated his "Yes" answer one year later at trial of the Underlying Action. Trial Ex. 134, Day 6, p. 147.

- Mr. Rice testified that he observed Mr. Anderson walking across Staniford Street "from [Mr. Rice's] right to the left" shortly before the accident (Trial Ex. 134, Day Five, p. 82), whereas Mr. Rice told Mr. Peltz and Mr. Fulton in 1998 that he "didn't see [Mr. Anderson] prior to the impact" (Trial Ex. 127, p. 13);

- Mr. Rice testified that his bus hit Mr. Anderson "[a]pproximately in the middle of [Staniford] street" (Trial Ex. 134, Day Five, p. 93), whereas Mr. Rice told Mr. Peltz and Mr. Fulton in 1998 that, at the moment of impact, Mr. Anderson was "three-quarters of the way across" the left-most travel lane on the Northbound side of Staniford Street, "about three feet" from the traffic island (Trial Ex. 127, pp. 11-12); and

- Mr. Rice testified that he "thought [Mr. Anderson] had walked out between two cars" (Trial Ex. 134, Day Five, p. 132), whereas Mr. Rice told Mr. Peltz in 1998 and Mr. Fulton that he had no idea where Mr. Anderson had come from (Trial Ex. 127, pp. 11-12).[14]

The preparation techniques utilized by Attorney Mahoney and Attorney Hambelton during Mr. Rice's "mock deposition" were not subtle and, in the eyes of this Court, crossed well over the line from ordinary witness preparation to impermissible witness manipulation.

5. <u>The Trial of the Underlying Action.</u>

The Underlying Action went to trial before a jury in Middlesex Superior Court, the Honorable Thomas E. Connolly presiding, for eighteen days commencing on June 10, 2003.[15] The Andersons, as plaintiffs, were represented at trial by Attorney Brody and his law partner,

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[14] These and other differences in Mr. Rice's testimony were described in a confidential observer's report sent to AIGTS during the trial of the Underlying Action as "major discrepancies" and "distinct areas of contradiction" that were "disquieting." Trial Ex. 2, pp. 132-133.

[15] On March 13, 2003, the Andersons, through their legal counsel, filed this separate action claiming that AIGCS and AIGTS had engaged in unfair and deceptive claims settlement practices in violation of M.G.L. c. 176D and 93A. Their Complaint was preceded by an appropriate demand letter under M.G.L. c. 93A, § 9. See, e.g., Trial Ex. 57. This case was stayed for approximately one year while the Underlying Action proceeded to trial. This Court lifted the stay, at the Andersons' request, on June 10, 2004.

In September 2010, the Andersons' counsel served AIGCS and AIGTS with a supplemental demand letter under Chapter 93A detailing the Defendants' alleged post-judgment unfair or deceptive acts or practices. Trial Ex. 121. The Court finds that supplemental demand letter also to have been timely given that the violations it described were ongoing through at least 2008.

Leonard H. Kesten. The defendants, Partners and Mr. Rice, were represented by John W. Patton, Jr., an experienced Chicago trial attorney who had been retained by AIGCS and AIGTS in the spring of 2003 to be lead trial counsel, and Attorney Hambelton of Gibson & Behman. Attorney Gibson observed the trial and offered advice to the defense attorneys, but did not play an active role in the proceedings. He was joined in the observation gallery by John P. Ryan, a Boston attorney who was retained by AIGTS, again shortly before trial, to be "appellate counsel" and to "sen[d] the message to plaintiff's counsel that we are not going to allow an exposure to our [excess] layer and will appeal any such verdict." Trial Ex. 66. Attorney Ryan also provided AIGTS personnel with daily written reports of the trial proceedings. See Trial Ex. 2, pp. 71-172.

A total of thirty-one witnesses testified at the trial of the Underlying Action, including Mr. Rice and Lieutenant Benanti. Shortly before Mr. Rice testified, counsel for the Andersons belatedly received, on the order of Judge Connolly, copies of the recorded statements that Mr. Rice and Mr. Hinds had given to Mr. Peltz in the fall of 1998. Attorney Kesten spent considerable time during his examination of Mr. Rice reviewing the numerous, material discrepancies between Mr. Rice's recorded statement and his trial testimony. Mr. Rice waivered, but continued to insist, on questioning from defense counsel, that he had "checked the crosswalk" in front of his bus immediately prior to the accident, and that Mr. Anderson had "[come] out from between two parked cars." Trial Ex. 134, Day Seven, p. 19.

Lieutenant Benanti was the last trial witness. Among other things, he told the jury (over the Plaintiffs' strenuous objection that Lieutenant Benanti's expert testimony concerning the purported point of impact had not been adequately disclosed prior to trial) that "the location

of the impact [had] to be far enough out into the roadway so that the bus could complete the turn without being in the [traffic] island." Trial Ex. 134, Day 17, p. 128.

Neither AIGCS, nor AIGTS, which assumed full control of the defense of the Underlying Action shortly before trial, made any settlement proposal to the Andersons until the day before trial commenced. The Andersons' pre-trial demand was $7.5 million. AIGTS made its first settlement offer in the amount of $800,000 (part of which was structured) just before jury empanelment commenced. That offer was rejected by the Andersons. The parties thereafter engaged in a series of proposals and counterproposals while the trial was underway, but no settlement agreement was reached.

On the next-to-last day of trial, Judge Connolly spoke privately with Attorney Ryan and inquired whether AIGTS would agree to a "figure of $3 million to settle the case." Trial Ex. 2, p. 79. Attorney Ryan advised Judge Connolly that, in his judgment, such a settlement "was not possible nor was it reasonable in the circumstances." *Id.* AIGTS made its last and best settlement offer in the amount of $1.8 million (part of which would have been paid over time) just before the case went to the jury. *Id.*, p. 71. The Andersons rejected the offer as insufficient and demanded $5.2 million. *Id.*, p. 72. AIGTS refused to increase its offer and the parties' pre-judgment settlement discussions came to an end. *Id.*

Closing arguments in the Underlying Action took place on Thursday, July 3, 2003, just before the long Fourth of July holiday weekend. Attorney Patton, arguing for the defense, told the jury that Mr. Anderson's accident could not have occurred two to three feet from the traffic island in the left-most lane of Staniford Street as claimed by Mr. Anderson and his family because "[p]hysics doesn't allow that. Math doesn't allow that. And that was the point of

Lieutenant Benanti's testimony." Trial Ex. 134, Day 18, p. 46. Rather, Attorney Patton argued that the Mr. Rice had operated the shuttle bus "[s]low and cautious the entire time," and that the accident occurred because Mr. Anderson came "out off that curb from between parked cars" while intoxicated and "walk[ed] in front of a bus without looking." *Id.*, p. 36, 44, 48. Attorney Kesten, arguing the issue of liability for the Andersons, asserted, in turn, that the "concept that [Mr. Anderson] stepped out between two cars, two parked cars" had been "wholly manufactured" by the defense in order to provide support for Lieutenant Benanti's expert testimony, a characterization that drew an immediate objection from Attorney Patton. *Id.*, pp. 70-71.

The jury deliberated for over two days and returned its verdict on Tuesday, July 8, 2003. The jury awarded Mr. Anderson $2,961,000 in damages, but found him forty-seven percent (47%) comparatively negligent. The jury also awarded $110,000 each to Kristen and Katarina Anderson. After a deduction was made for the jury's comparative negligence against Mr. Anderson and prejudgment interest was added, the total amount of the judgment came to $2,244,588.93.

6. AIGTS Appeals the Jury's Favorable Verdict.

The attorneys who handled the Underlying Action for the defense regarded the jury's compromise verdict as highly "favorable" to AIGCS and AIGTS' insureds, Partners and Mr. Rice, and unlikely to be replicated if the case was retried.[16] See, e.g., Trial Tr. Sept. 18,

[16] Myles W. McDonough, a Boston attorney who, along with Attorney Ryan, represented Partners and Mr. Rice in their eventual appeal from jury verdict in the Underlying Action, described the jury's 47% comparative negligence finding against Mr. Anderson as an "extraordinary one" in his later correspondence with AIGTS. Trial Ex. 107, p. 1. Attorney McDonough also predicted that "upon retrial it is certainly conceivable that a lesser figure, perhaps in the order of 25% to 30%, could be attributed to Mr. Anderson's comparative negligence." *Id.*

2013, p. 149 (Testimony of Attorney Hambelton); Trial Tr. Sept. 25, 2013, p. 149 (Testimony of Attorney Ryan). They were joined in this view by Judge Connolly, who met with counsel for both sides on several occasions after the trial ended in an effort to help foster a final resolution of the case. As reported by Attorney Ryan, Judge Connolly told defense counsel privately that he "felt that Lieutenant Benanti played a major role in achieving the substantial comparative negligence finding against Odin Anderson," and he "expressed great doubt that Lieutenant Benanti would ever be allowed to testify in a retrial" of the Underlying Action. Trial Ex. 91, pp. 2-3. Judge Connolly also told defense counsel that "there was no reason to believe that the defense would do any better at a retrial even if [they] were successful in having the appellate court order a new trial." *Id.*, p. 3.

Notwithstanding the views and advice of its legal counsel and Judge Connolly, AIGTS elected to appeal the jury's compromise verdict to the Massachusetts Appeals Court, a process that delayed the final resolution of the Underlying Action for an additional five (5) years. Attorney Ryan and Attorney McDonough handled the appeal for AIGTS, which sought an order from the Appeals Court "vacat[ing] the judgment entered in the Superior Court and remand[ing] the case for a new trial on liability and damages." Trial Ex. 105, p. 50. Attorney Ryan and Attorney McDonough's initial, none-too-rosy assessment of the defendants' chances on appeal told AIGTS that the "likelihood of a success ... may approach an even chance." Trial Ex. 87, p. 2. Their subsequent assessments of the defendants' chances were equally pessimistic. See, e.g., Trial Ex. 92, p. 5 (Attorney McDonough informing AIGTS in April 2005 that, "notwithstanding the existence of the plausible appellate grounds outlined in

our prior correspondence, while those issues are substantial, we would assess the likelihood of success on appeal to be below 50%").

While AIGTS' appeal from the jury verdict in the Underlying Action was pending, the parties, through their counsel, engaged in sporadic and oftentimes stormy settlement discussions. Attorney Brody and Attorney Kesten handled the settlement discussions on behalf of the Andersons, and Attorney Ryan, usually accompanied by a representative of AIGTS, handled the discussions on behalf of Partners and Mr. Rice. The Plaintiffs offered considerable testimony and documentary evidence at trial of this action in support their claim that AIGTS personnel made intentional misrepresentations during the course of the parties' post-trial settlement negotiations. The Court is of the view that the Andersons' negotiation-based claims, while not entirely without basis, contribute little to the merits of this case because it is evident that, after the trial of the Underlying Action, counsel for the Plaintiffs little or no credence to anything that AIGTS' representatives had to say.[17] The evidence regarding the parties' post-trial settlement negotiations, however, does support a finding, which this Court adopts, that AIGTS' delay in settling the Underlying Action resulted, at least in part, from AIGTS' interest in using the settlement of that case as a means to minimize or avoid the Defendants' potential liability to the Andersons in this Chapter 176D/93A action.[18]

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[17] For example, the Plaintiffs offered persuasive evidence at trial that Warren McCann, an AIGTS representative, undermined a potential settlement of the Underlying Action in May 2005 by telling Attorney Brody that AIG's "internal protocols" required any cash settlement payment to be delayed by at least 90 days. See, e.g., Trial Ex. 98, p. 3. Mr. McCann did not testify at trial, but Anthony Barberis, an AIG executive vice president in charge of excess claims, acknowledged on the stand that AIG had no such internal protocol. Trial Tr. Sept. 26, 2013, p. 102-103. Mr. Brody also testified, however, that he recognized at the time of his discussion with Mr. McCann that AIG's purported protocol "didn't make any sense." Trial Tr. Sept. 20, 2013, p. 68.

[18] For example, another sticking point for much of the parties' post-judgment settlement negotiations was AIGTS' insistence that the Andersons agree to the filing of a Stipulation of Dismissal of the Underlying Action, rather than a standard Acknowledgement of Judgment Satisfied. Trial Ex. 99, pp. 3-4. AIGTS insisted upon a (cont. on next page)

In April 2007, AIGTS and the Plaintiffs finally were able to reach an agreement to resolve the loss of consortium claims asserted by Mr. Anderson's wife, Kerstin Anderson, and his daughter, Katarina Anderson. As a result, AIGTS paid Kerstin Anderson and Katarina Anderson each the sum of $204,569.13 on or about May 8, 2007, and an Acknowledgement of Judgment Satisfied with respect to their consortium claims was filed shortly thereafter. Trial Ex. 2, p. 22; Trial Ex. 110. No settlement was reached with respect to Mr. Anderson's claim, however, with the result that AIGTS' appeal from the jury's verdict in favor of Mr. Anderson moved forward. *Id.*

The Massachusetts Appeals Court issued its decision affirming the judgment entered for Mr. Anderson in the Underlying Action on August 29, 2008. See *Anderson v. Rice*, 72 Mass. App. Ct. 1114 (2008). AIGTS thereupon instructed Attorney Ryan and Attorney McDonough to file an Application for Further Appellate Review with the Massachusetts Supreme Judicial Court, which promptly was denied by the SJC on November 4, 2008. See *Anderson v. Rice*, 452 Mass. 1107 (2008).

In early December 2008, AIGTS finally paid Mr. Anderson the full amount of the Superior Court judgment entered in his favor some five years earlier, and over ten (10) years after he was hit while walking across Staniford Street in Boston. The total amount of AIGTS' payment to Mr. Anderson, including pre and post-judgment interest, was $3,252,857.80.

Stipulation of Dismissal because it believed that allowing the Andersons' judgment to stand would dramatically increase AIGTS' potential Chapter 93A exposure in this action. Trial Ex. 2, p. 48 ("[A]cessible damages under a stip would be for plaintiff['s] loss of use of the money, [while] under [a] judgment 2 to 3 times the filed judgment or $5M – 7.5M. In house meeting all advised of non settlement. Await appeals to proceed.").

Rulings of Law

1. M.G.L. c. 176D.

The legislative act adopting Massachusetts General Laws c. 176D was titled "Unfair Methods of Competition and Unfair and Deceptive Practices in the Business of Insurance." St. 1972, c. 543, § 1. As described by the Massachusetts Supreme Judicial Court, Chapter 176D was enacted, in part, "to encourage the settlement of insurance claims and discourage insurers from forcing claimants into unnecessary litigation to obtain relief." *Clegg v. Butler*, 424 Mass. 413, 419 (1997). To these ends, the statute spells out various specific acts or omissions that, if committed by an insurer doing business in this Commonwealth, constitute "unfair claim settlement practices." M.G.L. c. 176D, § 3(9). Prohibited acts or omissions include, but are not limited to, "[f]ailing to pay claims without conducting a reasonable investigation based on all available evidence," and "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." *Id.*, § 3(9)(d) and (f).

Since M.G.L. c. 176D first was enacted in 1972, a considerable body of case law has developed interpreting and applying its provisions. The case law establishes, among other things, that the obligations imposed on insurers by Chapter 176D apply with equal force to insureds and third-party claimants (see, e.g., *McGovern Physical Therapy Assoc., LLC v. Metropolitan Prop. & Cas. Ins. Co.*, 802 F.Supp.2d 306, 315 (D. Mass. 2011), citing *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 658-659 (2003) ("*Bobick II*")), and that the obligations apply to all stages of the claim settlement process, including the investigatory phase, pre-trial proceedings, trial and post-trial appeals (see, e.g., *Rhodes v. AIG Domestic*

Claims, Inc., 461 Mass. 486 (2012) (Applying the provisions of Chapter 176D to insurer's post-judgment conduct)).

Chapter 176D, in-and-of-itself, contains no private enforcement mechanism. Rather, "recourse for an individual injured by an insurer's G.L. c. 176D violation is available through G.L. c. 93A ... to those plaintiffs able to sue under G. L. c. 93A, § 9." *Adams v. Liberty Mut. Ins. Co.*, 60 Mass. App. Ct. 55, 63 n.14 (2003). Multiple damages may be imposed in appropriate circumstances, including when necessary to "penalize insurers who unreasonably and unfairly force claimants into litigation by wrongfully withholding insurance proceeds." *Clegg*, 424 Mass. at 425.

In this case, the Andersons allege that AIGCS and AIGTS violated Sections 3(9)(d) and (f) of Chapter 176D in the handling of their claims arising from Mr. Anderson's accident in September 2008. It is undisputed that AIGCS and AIGTS did not settle the Andersons' claims prior to trial or for many years afterwards. The question presented is whether they were justified in doing so. In resolving this question, the Court will address each alleged violation of Chapter 176D separately.

2. AIGCS and AIGTS' Failure to Conduct a Reasonable Investigation Based on All Available Evidence.

Section 3(9)(d) of Chapter 176D imposes liability on an insurer for "[f]ailing to pay claims without conducting a reasonable investigation based on all available evidence." The Court has no difficulty in concluding, in the circumstances of this case, that AIGCS and AIGTS' investigation of Mr. Anderson's accident failed to meet this standard in at least two material respects.

First, AIGCS and AIGTS' investigation of Mr. Anderson's accident was not "based on all available evidence." For a period of years leading up to the trial of the Underlying Action in June and July 2003, AIGCS and AIGTS at the very least ignored, and more accurately suppressed, the recorded statements that Mr. Rice and Mr. Hinds had provided to AIGCS' in-house investigator, Mark Peltz, in the fall of 1998. Those statements constituted the best evidence as to why and how Mr. Anderson's accident occurred, yet they played little or no part in AIGCS and AIGTS' investigation of the accident or in its settlement decision-making after approximately 2000, although they remained available in AIGCS and AIGTS' claim file. AIGCS and AIGTS acted unreasonably and unfairly in effectively disregarding Mr. Rice and Mr. Hinds' recorded statements for purposes of its investigation into Mr. Anderson's accident. See, e.g., *Bohn v. Vermont Mut. Ins. Co.*, 922 F.Supp.2d 138, 149 (D. Mass. 2013) ("Among other possible ways, an insurer violates [Chapter 176D] by purposefully and strategically failing to pursue a line of inquiry because it would uncover unfavorable evidence."); *Sterlin v. Commerce Ins. Co.*, 25 Mass. L. Rep. 124 (Mass. Super. Ct. 2009) (Insurer violated Chapter 176D, in part, by conducting investigation that was "blind to the evidence and factual material that was available.").

Second, AIGCS and AIGTS' investigation of Mr. Anderson's accident incorporated and unjustifiably relied upon fictitious evidence. The "running between parked cars" scenario that AIGCS, AIGTS and defense counsel made the centerpiece of their defense strategy in the Underlying Action was nothing but a chimera, as AIGCS and AIGTS personnel well knew.[19]

[19] See discussion at pages 16-17, *supra*. To the extent AIGCS and AIGTS argue that they reasonably could *infer* that Mr. Anderson ran out onto Staniford Street from "between parked cars" from the facts in the Underlying Action, that argument must be rejected because there was no evidence presented of any "parked cars" (cont. on next page)