

# MASSACHUSETTS LAWYERS WEEKLY

## Unfair settlement practices result in trebled jury verdict

By: Eric T. Berkman April 16, 2014



Lawyers say a Superior Court order that an insurance carrier pay treble damages and attorneys' fees for post-verdict violations of chapters 93A and 176D sends a powerful warning in the wake of the Supreme Judicial Court's landmark *Rhodes* ruling about what can happen to an insurer that contests claims which have already gone to judgment.

In 2012, the SJC ruled in *Rhodes v. AIG Domestic Claims, Inc.* that

multiple damages for chapters 93A and 176D violations stemming from post-judgment insurer misconduct should be calculated based on the size of the underlying tort judgment itself, not the plaintiff's loss of use of the money from the time of judgment to the time of settlement.

In the Superior Court case, which also involved AIG, an attorney suffered brain damage when he was struck by a shuttle bus while he was crossing the street. AIG claimed handlers quickly concluded that liability was clear. Nonetheless, the insurance company refused to settle the case and, after five years of contentious back-and-forth, took the case to trial, offering a defense that the plaintiff, who had an elevated blood-alcohol level at the time, was hit while running between two cars and into the path of the bus.

A jury awarded the plaintiff \$3 million in damages but found him 47 percent at fault; the judge reduced the award to reflect the comparative negligence finding.

The plaintiff sued AIG under 93A and 176D when it continued to dispute the claim.

Superior Court Judge Brian A. Davis held a two-week bench trial in September and ruled earlier this month that AIG had engaged in "egregious" conduct not only by failing to offer a settlement when liability was clear, but also by suppressing the bus driver's initial admission; by its outside trial counsel coaching the driver to change his testimony; and by concocting a defense based on fictitious evidence.

Accordingly, Davis tripled the jury award and awarded attorneys' fees to the plaintiff. The multiple damages will total more than \$6.5 million before counsel fees are added.

"Since *Rhodes* was decided, the handwriting was on the wall," said Michael C. Gilleran, a lawyer at Adler, Pollock & Sheehan in Boston who authored the Massachusetts treatise on Chapter 93A law. "If you let an underlying case that's an insured claim go to judgment without settling, you are at an extreme risk, not just of being liable for the underlying amount, but for the double or triple. This case emphasizes dramatically — as did *Rhodes* — that utmost care be taken at this point."

Plaintiff's counsel Leonard H. Kesten of Boston said the decision is also important because it shows that a jury's finding of comparative negligence is not a bar to an insurance bad-faith claim.

"Many in both the defense and plaintiffs' bar believe that a high comparative negligence award in an underlying trial will shield them from bad-faith liability because the underlying tort liability is not reasonably clear," Kesten said. "Prior to this opinion, even a lot of judges would have said that. But that's not the case."

The 39-page decision is *Anderson, et al. v. American International Group, Inc., et al.*, Lawyers Weekly No. 12-041-14. The full text of the ruling can be ordered at [masslawyersweekly.com](http://masslawyersweekly.com).

### **'They got caught'**

Richard E. Brody, Kesten's co-counsel and partner at Brody, Hardoon, Perkins & Kesten, questioned whether AIG had learned anything from *Rhodes*.

"You're not supposed to lie, hide evidence, make things up or hire [experts] who will say anything," Brody said. "They did and got caught."

Brody said his client may contest the amount of the multiple damages. Davis found that AIG had acted egregiously, which brings treble damages under the statute. According to Brody, that means the client should receive his damages plus three times that amount as the punitive component, while Davis simply multiplied the damages amount by three, arriving at a total recovery of three times the damages.

Anthony R. Zelle of the Boston firm Zelle, McDonough & Cohen, represented AIG. He said he was not authorized to speak on the insurance company's behalf, but he did comment that chapters 93A and 176D were not drafted to fit together precisely, and that the 1989 amendment of Chapter 93A upon which the SJC based its *Rhodes* decision has created a conflict that needs to be clarified.

"In the context of liability insurance policies, the courts have construed the statute to confer on third parties to an insurance contract direct rights against an insurer," Zelle said. "However, a third-party claimant's interests are directly opposed to the policyholder, with whom the insurer has contractual privity and to whom the insurer owes a duty of good faith and fair dealing."

In certain circumstances, a carrier's obligation to defend its insured as zealously as the law permits is simply irreconcilable with conferring equal rights on a third-party claimant, he said.

"At the end of the day, an insurer cannot be punished for defending the interests of its insured," Zelle added.

Attorney Andrew F. Caplan of Twohig Caplan in Swampscott, who represents policyholders in coverage and bad-faith claims, called the ruling a "watershed" decision for insurance bad faith in Massachusetts.

"The message to carriers is that you're going to pay dearly if you stonewall a valid insurance claim," Caplan said.

For those who represent personal-injury plaintiffs and policyholders, the message is "stick to your guns," he said. "Keep pushing the Chapter 93A case and keep pushing it aggressively, because there can be a big financial reward for exposing insurer bad faith."

The decision further sends an important message to other judges about the credibility of insurance companies' litigation positions and tactics, which could lead to courts enforcing 93A and 176D more strictly than in the past, he said.

Boston attorney Edward S. Cheng represented two lawyers who served as AIG's outside trial counsel in the underlying tort case. He said he was confident that the work that was done in the underlying case was "proper."

Cheng also pointed out that his clients were not party to the Chapter 93A case against AIG and thus had no opportunity to defend themselves against the allegations of misconduct.

"The court could only draw conclusions based on the evidence before it, which leaves outside counsel vulnerable to second-guessing," said Cheng, who practices at Sherin & Lodgen. "This creates a potential chilling effect on properly

preparing witnesses.”

### **Protracted litigation**

On Sept. 2, 1998, plaintiff Odin Anderson, a Boston attorney, was crossing Staniford Street in downtown Boston when a Partners Healthcare shuttle bus struck him. He suffered brain damage as a result.

Defendant AIG Claims Services handled claims for Partners’ primary and excess auto carriers. Within a few months, based on interviews with bus driver Norman Rice and another Partners employee, Tony Hinds, who was driving the bus behind him, AIG claims investigators determined that liability was clear and that AIG should settle Anderson’s injury claim.

The investigators’ conclusion was based largely on Rice’s admission that he was looking to his right while turning left at the moment of impact. Hinds’ testimony confirmed that Rice simply did not see Anderson.

But the pace of settlement moved slowly. Then, in early 2000, attorney Brody notified AIG that Anderson had retained him to pursue his claim and that a settlement demand was forthcoming.

AIG personnel familiar with Brody’s “aggressive” reputation engaged an outside law firm, Boston’s Gibson & Behman, to fight the claim despite its adjustors’ determination that liability was reasonably clear.

In early 2001, Brody made a \$5 million settlement demand. In May, with no counteroffer issued, Anderson filed a personal-injury suit against Partners and Rice.

According to Davis’ findings, AIG and its outside counsel dealt with the problems posed by the statements of Rice and Hinds by suppressing them. The statements were withheld from Anderson’s lawyers until trial and were produced only after an inadvertent disclosure of their existence.

Additionally, as Davis found, the suppression of the statements enabled AIG to devise an alternate scenario in which Anderson — who both sides stipulated had an elevated blood-alcohol level at the time of the accident — was recklessly running between two cars at the time of the accident, darting in front of the shuttle bus. Though no witness ever testified to that set of facts, AIG used the scenario as the basis for its defense at trial.

AIG further advanced that theory by hiring an accident-reconstruction expert to testify that it was “impossible” for the accident to have occurred as the plaintiff claimed it had, despite evidence that that plaintiff’s counsel had been able to recreate the scene using an identical shuttle bus.

Meanwhile, after examining mock deposition videos, Davis found that AIG outside attorneys Michael Mahoney and H. Charles Hambelton had coached Rice into revising his version of events for trial.

In July 2003, after an 18-day trial, the jury found Partners negligent, awarding \$2.9 million in damages, but found Anderson 47 percent comparatively negligent.

Despite the advice of trial counsel and the trial judge that a retrial was unlikely to result in a more favorable result, AIG elected to appeal the verdict. Meanwhile, the plaintiff filed a 93A/176D action.

The Appeals Court and the SJC both rejected the appeal, and in December 2008 AIG finally paid the full amount of the Superior Court verdict.

The 93A/176D action went to trial in September 2013. Earlier this month, Davis found AIG liable, ordering it to pay treble damages and attorneys’ fees.

### **‘Egregious’ conduct**

Davis identified two theories to support his decision that AIG violated chapters 93A and 176D.

First, Davis found that AIG's suppression of Rice's statements after the accident demonstrated that it had failed to conduct a "reasonable" investigation based on "all available evidence."

Worse, the judge said, with respect to the "running between parked cars" scenario, AIG's investigation of the plaintiff's accident "incorporated and unjustifiably relied upon fictitious evidence."

The defense theory "was nothing but a chimera, as [AIG personnel and outside counsel] well knew," Davis said. "No matter how elastic the words 'reasonable investigation,' as they are used in [the statute] may be, they cannot be contorted so far as to include an investigation that knowingly or willfully incorporates false or non-existent facts."

Davis also found that AIG had failed to promptly settle the plaintiff's claim once liability had become reasonably clear. He rejected AIG's contention that the jury's comparative negligence finding showed that Rice's liability was not reasonably clear.

"This argument treads heavily on very thin ice," Davis said. "[I]t is enough that the great weight of the evidence supports the conclusion, which this court draws, that the jury's verdict was brought about, in significant part, by [AIG and defense counsel's] pre-trial suppression of critical evidence, creation of an alternative accident scenario based upon fictitious facts, and improper manipulation of critical witness testimony." MLW

For JUMPBOX

**CASE:** *Anderson, et al. v. American International Group, Inc., et al.*, Lawyers Weekly No. 12-041-14

**COURT:** Superior Court

**ISSUE:** Was a jury's comparative negligence finding a bar to a claim that an insurer committed bad faith by failing to settle a case in which liability was reasonably clear and by concocting a fictitious defense?

**DECISION:** No

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