STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: June 28, 2019)

GEORGE MATHEWS,	:	
	:	
Plaintiff,	:	
	:	
VS.	:	**C.A. No. PC-2016-4145**
	:	
TRAVELERS OF MASSACHUSETTS a/k/a PREMIER INSURANCE COMPANY,	:	
	:	
Defendant.	:	

DECISION

LICHT, J. This matter arises out of an automobile accident that occurred in 2003. The parties came before the Court for a bench trial on the issue of whether Travelers of Massachusetts a/k/a Premier Insurance Company (Travelers) violated Massachusetts General Laws (M.G.L.) Chapter 93A in its handling of a passenger's injury claim from that accident. Jurisdiction is pursuant to G.L. 1956 § 8-2-14 and findings of fact and conclusions of law are made pursuant to Superior Court Rules of Civil Procedure 52. For the reasons set forth below, the Court finds that Travelers did not violate M.G.L. ch.93A.

I

Facts and Travel

On March 13, 2003, Gilmar DaSilva (DaSilva) lost control of his vehicle, causing him to strike the median barrier while traveling westbound through snow and slush on Interstate 195 in East Providence, Rhode Island. Joint Statement of Facts (Joint Statement) Ex. 1. George

Mathews, Jr., who had been traveling behind DaSilva, was unable to stop his vehicle when DaSilva's vehicle collided with the barrier, and the left front end of his vehicle struck the right rear end of DaSilva's vehicle. *Id.* The police report indicates that DaSilva had no injuries, and George Mathews, Jr. had no visible injury or complaints of pain. Joint Statement Ex. 1. The police report makes no mention of any passengers. *See id.*

At the time of this accident, DaSilva insured his vehicle with Travelers, and his policy required any insureds to "cooperate with [Travelers] in the investigation, settlement and defense of any claim or lawsuit." Joint Statement Exs. 2, 3 § 32. Travelers first received notice of this accident from DaSilva's insurance agent on or about March 20, 2003, and a Travelers representative called DaSilva the same day, but he could not give information on the accident at that time. Joint Statement ¶ 7, Ex. 3 at 37. Thereafter, on or about March 25, 2003, Travelers received notice of an injury claim for George Mathews, Sr. (Mathews), who had been a passenger in the vehicle driven by his son, George Mathews, Jr. Joint Statement Ex. 4; *see* Joint Statement ¶¶ 3, 9. Travelers spoke with a translator for DaSilva on March 26, 2003, to make arrangements regarding DaSilva's vehicle. Joint Statement Ex. 3.

After having no contact with DaSilva since March 26, 2003, Travelers reassigned its file to Claims Representative Karen Tavares (Tavares) on May 31, 2005. Joint Statement ¶ 12. Seven months later on December 1, 2005, Tavares prepared a Liability Serious Injury Record indicating that Travelers was willing to settle Mathews' injury claim and seek contribution from Liberty Mutual Insurance Co. (George Mathews, Jr.'s insurer), and also noted that intercompany arbitration was decided at "50/50" liability. Joint Statement Ex. 6. On December 6, 2005, Tavares

sent letters to DaSilva at two different addresses,[1] one of which was returned as undeliverable. Joint Statement Ex 12. The letters notified DaSilva that suit may be filed against him in relation to the automobile accident (referred to as "potential suit" letters in the Joint Statement) and asked him to contact Travelers should he receive any legal documents. *Id.*; Joint Statement ¶ 14.

Plaintiff filed the first suit related to this accident on December 23, 2005, and attempted to serve DaSilva for the first time on December 30, 2005. Joint Statement ¶ 16, Ex. 8; *George Mathews v. Gilmar DaSilva et al.*, C.A. No. PC-2005-6610. Thereafter, on February 9, 2006, Plaintiff's counsel did a "post office check" that revealed that DaSilva had moved, but left no forwarding address. Joint Statement ¶ 17, Ex. 8. Plaintiff was not able to serve DaSilva, and on April 27, 2006, Plaintiff was granted an extension of time for service of process. Joint Statement ¶¶ 19-20, Ex. 7 at 2. Plaintiff faxed a courtesy copy of the summons and complaint to Tavares at Travelers on May 4, 2006. Joint Statement ¶¶ 21-22.

After receiving the courtesy copy of the summons and complaint, Travelers made diligent, although ultimately unsuccessful, efforts to locate its insured. Joint Statement ¶¶ 69, 71. On May 9 or 10, 2006, Tavares attempted to reach DaSilva at two different telephone numbers, one of which was disconnected and the other, believed to belong to DaSilva's interpreter, on which Tavares was able to leave a voicemail. Joint Statement ¶¶ 23-24, Ex. 13. Travelers also hired an investigator, and on May 11, 2006, the investigator went to DaSilva's last known address, where he was told no one named "DaSilva" lived there. Joint Statement ¶¶ 28-29, Ex. 11. The investigator checked the VIN of a car similar to DaSilva's that was parked at the address and verified it was not DaSilva's vehicle. *Id.* The investigator also ran traces on two phone listings,

[1] Tavares sent letters to the address on the police report and the address listed on his insurance policy, 77 Main Street and 530 East Main Street, both in Fall River, Massachusetts. Joint Statement ¶ 14.

credit checks, database checks, and registry checks, all of which were unfruitful. Joint Statement ¶¶ 28-30, Exs. 11, 16. However, Travelers' efforts, if any, to locate DaSilva between March 26, 2003, and receipt of the courtesy copy of the summons and complaint on May 5, 2006, are not in the record. *See* Joint Statement ¶¶ 22, 73.

In addition to the above efforts to locate DaSilva, on May 10, 2006, Travelers conducted a "Suit Committee Review" of Mathews' injury claim and issued a report (Suit Report) that indicates the applicable policy limit for the injury claim was $25,000 and a demand had been made to settle the claim in that amount. Joint Statement ¶¶ 25-27, Ex. 9. The Suit Report also notes that Travelers did not have Mathews' medical records and/or bills at that time. Joint Statement Ex. 9.

Plaintiff's counsel also undertook efforts to locate DaSilva and hired an investigator, but by September 2006, the investigator had "exhausted all avenues in an attempt to locate" him. Joint Statement ¶ 31, Ex. 14. Additionally, the investigator informed Plaintiff's counsel that the owner of the property where DaSilva last lived did not have a forwarding address for him. *Id.* On October 5, 2006, Plaintiff made motion for alternative service on DaSilva, which was denied on October 18, 2006. Joint Statement ¶¶ 32-33, Exs. 7, 8.

Almost three years later, in June 2009, Plaintiff attempted to serve DaSilva at a different address, but was unable to do so. Joint Statement ¶ 34, Ex. 21. That same month, Plaintiff hired another investigator after his constables failed to serve DaSilva at addresses in Plymouth and Worcester. Joint Statement ¶ 35. The Plymouth constable received information that DaSilva stayed at the Plymouth address and had been seen that year (2009), but he was not a tenant on the lease. *Id.* After a comprehensive search, the investigator could not locate DaSilva and indicated that he believed that DaSilva moved to Brazil. *Id.*; Ex. 21.

This Court, Stern, J., dismissed the case against DaSilva on July 28, 2010 pursuant to Super. R. Civ. P. 4(l), and Plaintiff filed a second complaint against DaSilva two days later.[2] *George Mathews v. Gilmar DaSilva*, C.A. No. PC-2010-4480; Joint Statement ¶¶ 36-37, Exs. 10, 17. On August 4, 2010, Plaintiff attempted service on DaSilva through the Rhode Island Registry of Motor Vehicles at various addresses, even though prior attempts to serve DaSilva at those addresses had failed. Joint Statement ¶¶ 38-39. Travelers then sent another investigator to locate DaSilva in September 2010, and after conducting another address visit and registry search, also found that DaSilva may have returned to Brazil. Joint Statement ¶¶ 40, 42-45, Ex. 15.

On January 19, 2011, Plaintiff's motions for entry of default or in the alternative an order of notice to serve DaSilva via publication were heard. Joint Statement ¶¶ 46, 48-49, Ex. 17. The motion for an order of notice was granted, and on February 8, 2011, a summons was published in the *Herald News*. Joint Statement ¶¶ 48, 50, Exs. 17, 22. Plaintiff's Motion for Entry of Default was granted on March 30, 2011, over Travelers' objection through a limited appearance of counsel. Joint Statement ¶¶ 47, 51, Exs. 17, 18. Almost two years later, on February 20, 2013, Plaintiff filed an Amended Complaint to add Liberty Mutual Insurance Co. (Liberty) as a defendant. Joint Statement ¶ 52, Ex. 17. Liberty then filed a Third-Party Complaint against Travelers on April 17, 2014. Joint Statement ¶ 53, Ex. 17.

On January 14, 2015, Plaintiff offered to settle his claim against DaSilva with Travelers for $25,000. Joint Statement ¶ 55, Ex. 23. In February 2015, Plaintiff's investigator again tried to locate DaSilva, but to no avail. Joint Statement ¶ 57, Ex. 19. On June 25, 2015, the Court granted Plaintiff's motion for default judgment, and judgment entered on March 18, 2016 in the

[2] Refiling this action after the statute of limitations ran was permissible under G.L. 1956 § 9-1-22, commonly referred to as the "savings statute."

amount of $72,000 plus interest and costs. *See* Joint Statement ¶¶ 58-59, Exs. 17, 24. Plaintiff was unable to execute on his judgment, but on June 30, 2016, Plaintiff was granted the right to reach and apply any bad faith claims or 93A claims that DaSilva may have against Travelers. Joint Statement ¶¶ 61, 67, Ex. 20. Plaintiff's counsel sent a letter to Travelers on July 25, 2016, (93A Letter or Letter), and Travelers responded on August 25, 2016. Joint Statement ¶¶ 63, 65, Exs. 25, 26. When Travelers did not put forth a settlement offer in response to Plaintiff's 93A Letter, Plaintiff filed the instant suit against Travelers.

Thereafter, Plaintiff and Travelers filed Cross Motions for Summary Judgment. This Court, Keough, J., determined that Rhode Island law is inapplicable to the issue of whether Travelers breached its duty to its insured under its Massachusetts automobile policy, and therefore granted summary judgment for Travelers with regard to Count I of the Complaint, which was a claim based on *Asermely v. Allstate Ins. Co.*, 728 A.2d 461 (1999) under Rhode Island law, and denied Plaintiff's Motion for Summary Judgment with regard to the same. Count II of the Complaint for Mathews' claim under M.G.L. ch.93A remains. *See* Compl. ¶¶ 9-22. In Count II, Mathews asks the Court to enter judgment against Travelers in the amount of $72,000 plus interest from March 13, 2003 (the date of the motor vehicle accident), double or triple damages, punitive damages, and attorney's fees and costs. Compl. 3.

On February 5, 2019, the Court conducted a bench trial based upon a Joint Statement of Facts and joint exhibits. The parties ask the Court to determine whether Travelers violated M.G.L. ch.93A either by failing to settle Mathews' injury claim after liability had become reasonably clear (as required under M.G.L. ch.176D § 3(9)(f)) or by failing to offer an explanation of as to a settlement offer or denial (under M.G.L. ch.176D 3(9)(n)), and if so, to determine the amount of

damages. Based upon the record before the Court, the Court finds that Travelers did not violate M.G.L. ch.176D 3(9)(f) or 3(9)(n), and thus did not violate M.G.L. ch.93A.

II

Standard of Review

The standard of review in a non-jury trial is governed by Superior Court Rule of Civil Procedure 52(a). "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." Super. R. Civ. P. 52(a). "The trial justice sits as a trier of fact as well as of law." *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). However, when a case is tried upon stipulated facts, "the [C]ourt has no independent fact-finding function and its role is limited to applying the law to the agreed-upon facts." *Hagenberg v. Avedisian*, 879 A.2d 436, 441 (R.I. 2005). Thus, the scope of review of such application is "narrowly defined." *Id.* "[A] trial justice's analysis of the evidence and findings in the bench trial context need not be exhaustive." *McBurney v. Roszkowski*, 875 A.2d 428, 436 (R.I. 2005). "Even brief findings will suffice as long as they address and resolve the controlling factual and legal issues." *White v. LeClerc*, 468 A.2d 289, 290 (R.I. 1983).

III

Analysis

By enacting M.G.L. ch.93A, "the [Massachusetts] Legislature intended to create new substantive rights and procedural devices substantially broadening the vindication of consumers' rights." *Richards v. Arteva Specialties S.A.R.L.*, 850 N.E.2d 1068, 1073 (2006) (internal citations omitted). To that end, M.G.L. ch.93A § 2 applies to consumers and makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful." M.G.L. ch.93A § 2(a).

For Plaintiff to prevail in this action, he must clear three hurdles. First, he must have properly invoked this Court's jurisdiction with an adequate 93A letter. Secondly, he must establish that DaSilva had coverage with Travelers. Lastly, he must establish that Defendant violated M.G.L. ch.176D, Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance, specifically Section 3(9), Unfair claim settlement practices, which enumerates particular actions that are "unfair claim settlement practice[s]" and are actionable under M.G.L. ch.93A. See M.G.L. ch.93A § 9(1). The Court will proceed to analyze each of these issues in seriatim.

A

Adequacy of the 93A Letter

As a "jurisdictional prerequisite to suit" under M.G.L. ch.93A against an insurance company, a plaintiff must make a written demand on the insurer thirty days before filing suit. *See* M.G.L. ch.93A § 9(3). *Spring v. Geriatric Auth. of Holyoke*, 475 N.E.2d 727, 736 (1985). The demand must "identify[] the claimant and reasonably describ[e] the unfair or deceptive act or practice relied upon and the injury suffered . . . ." M.G.L. ch.93A § 9(3). An adequate demand letter will do this "in a manner that provides the prospective defendant with an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and enables him to make a reasonable tender of settlement." *Simas v. House of Cabinets, Inc.*, 757 N.E.2d 277, 283 (2001) (internal quotations omitted). Additionally, to qualify as a demand letter under M.G.L. ch.93A, the letter should contain at least one of the following six things (or, at a minimum, "contain some other signal which will alert a reasonably perceptive recipient"):

> "(1) [an] express reference to [Chapter] 93A; (2) [an] express reference to the consumer protection act; (3) [an] assertion that the rights of the claimants as consumers have been violated; (4) [an] assertion that the defendant has acted in an unfair or deceptive

> manner . . . ; (5) [a] reference that the claimants anticipate a settlement offer within thirty days . . . ; or (6) [an] assertion that the claimant will pursue multiple damages and legal expenses, should relief be denied." *Cassano v. Gogos*, 480 N.E.2d 649, 651 (1985).

However, "technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice." *Richards*, 850 N.E.2d at 1073. For example, in letters sent to an insurer, identifying the specific subsection of M.G.L. ch.176D that is alleged to have been violated is not required. *Cohen v. Liberty Mut. Ins. Co.*, 673 N.E.2d 84, 90 (1996).

"The purposes of the letter are twofold: (1) 'to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct' and (2) 'to operate as a control on the amount of damages which the complainant can ultimately recover.'" *Spring*, 475 N.E.2d at 736 (quoting *Slaney v. Westwood Auto, Inc.*, 322 N.E.2d 768, 779 (1975)). Neither of these objectives are achieved "by keeping the nature of the action concealed." *Cassano*, 480 N.E.2d at 651. Without including the specific criteria required by statute and case law, "the potential defendant is without warning that the claimant intends to invoke the heavy artillery of [Chapter] 93A, i.e., multiple damages and the imposition of counsel fees." *Id.* "It is neither constructive nor fair to allow proceedings to be launched by a demand which hides its identity." *Id.*

Plaintiff met the statute's required thirty-day waiting period before filing suit. His 93A Letter was sent via certified mail on July 25, 2016, and more than thirty days later, Plaintiff filed his Complaint on September 1, 2016. Joint Statement ¶ 63, Ex. 25. The 93A Letter specifies the parties and the injury suffered as a result of Travelers' alleged violation (judgment entering against DaSilva). Joint Statement Ex. 25 at 4. The 93A Letter cites Chapter 93A, Section 9, the Consumer Protection Act, and closes with a demand for a settlement offer within thirty days and references

multiple damages and attorney's fees that could be awarded, thereby including most of the six additional requirements (although only one is needed). *See Cassano*, 480 N.E.2d at 651.

Plaintiff's 93A Letter is more problematic regarding the final requirement that it must "reasonably describ[e] the unfair or deceptive act or practice relied upon." M.G.L. ch.93A § 9(3). The majority of the 93A Letter contains the facts and travel of this case. The only language from M.G.L. ch.176D used in the 93A Letter whereby Travelers could have deduced its alleged violation is a statement that "liability is . . . 'reasonably clear' within the meaning of M.G.L. 176D § 3(9)."[3] *See* Joint Statement Ex. 25 at 2. M.G.L. ch.176D §§ 3(9)(f) and 3(9)(m)[4] both use the phrase "liability has become reasonably clear." Although identity of the subsection is not required for the 93A Letter to be adequate under the statute, the lack of clarity regarding which subsection is alleged to have been violated adds ambiguity to the Letter, particularly because the Letter does not give any additional facts, such as *when* liability was reasonably clear or *how*, specifically, Travelers breached its duty to DaSilva. *See Cohen*, 673 N.E.2d at 90. Although the facts on which Plaintiff rests his allegation under M.G.L. ch.176D § 3(9)(f) are nebulous, it cannot be said that

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[3] There is one other statement—"As a result of your company's actions and omissions, your insured now has a judgment against him for $185,429.51 . . . you have breached a duty to your insured"—that could be construed as notice to Travelers of what the deceptive act or practice alleged was, which is, Joint Statement Ex. 25 at 4. This statement implies that Plaintiff's contention is that Travelers violated M.G.L. ch.93A simply because it did not pay his injury claim, which, in itself, is not a violation of M.G.L. ch.93A. *See Guity v. Commerce Ins. Co.*, 631 N.E.2d 75, 77 (1994). Nowhere preceding this statement or after it does the 93A Letter specify the particular "actions and omissions" it references. Therefore, this statement, by itself, does not meet the M.G.L. ch.93A requirement.

[4] "Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions:

. . . .

> "(m) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; . . ." M.G.L. ch.176D § 3(9)(m).

Travelers was without notice that Plaintiff alleged a violation of M.G.L. ch.93A, specifically that it failed to pay Mathews' claim. Moreover, Travelers' response to the Letter refers to M.G.L. ch.93A, demonstrating that it knew to what type of serious allegation it was responding. *See* Joint Statement Ex. 26.

Finally, the 93A Letter contains sufficient facts by which Travelers could infer that Mathews alleged a violation of M.G.L. ch.176D § 3(9)(n) for failure to provide a reasonable explanation regarding a denial (or, more accurately in this case, an explanation regarding a failure to pay). The 93A Letter alleges that on or about January 14, 2015, Plaintiff's counsel sent a letter to Travelers agreeing to settle the claim for the policy limits. *See* Joint Statement Ex. 25 at 3. Plaintiff then draws Travelers' attention to Rhode Island law that requires an insurer "to seriously consider a plaintiff's reasonable offer to settle within the policy limits." *Id.* at 3. Although Rhode Island law does not apply to Mathews' M.G.L. ch.93A claims, Travelers could infer from the preceding references in the Letter that Plaintiff believed Travelers did not seriously consider his offer of settlement in January 2015.

Although the Letter is on the outer fringes of sufficiency, Travelers was aware that Plaintiff alleged a violation of M.G.L. ch.93A as shown by its response letter to Plaintiff's counsel. *See* Joint Statement Ex. 26. To require more from Plaintiff in this case would read technicalities into the statute that would "impede the accomplishment of substantial justice" by not permitting the Court to reach the merits of Plaintiff's claim. *See Richards*, 850 N.E.2d at 1073. The 93A Letter is adequate under M.G.L. ch.93A § 9(3), and thus the Court has jurisdiction over this matter.

B

Coverage under the Travelers' Policy

The Court must next determine if DaSilva had coverage under his insurance policy with Travelers because where there is no insurance coverage, there can be no M.G.L. ch.93A violation. *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 645 N.E.2d 1165, 1169-70 (1995); *see also Surabian Realty Co. v. NGM Ins. Co.*, 971 N.E.2d 268, 274-75 (2012) (holding that the trial justice properly granted summary judgment in favor of the insurer and thus denied all of the insured's claims, including those under M.G.L. chs.93A and 176D, where its denial of coverage was based on a correct interpretation of its insurance policy).

An insurer can disclaim coverage if its insured has not complied with the policy; however, the insurer must show "actual prejudice to insurer's interests due to lack of an insured's cooperation" before it can disclaim coverage.[5] *Darcy v. Hartford Ins. Co.*, 554 N.E.2d 28, 33 (1990). Actual prejudice has been found where an insurer was deprived of the testimony of a material witness to the accident '"despite diligent good faith efforts on the part of the insurer to locate"' the witness. *Boyle v. Zurich Am. Ins. Co.*, 36 N.E.3d 1229, 1237 (2015) (quoting *Darcy*, 554 N.E.2d at 31-32). Moreover, an insurer's failure to send a reservation of rights letter to its insured waives the insurer's noncooperation defense where insurer '"exercised dominion over the case at an important point."' *See DiMarzo v. Am. Mut. Ins. Co.*, 449 N.E.2d 1189, 1199 (1983) (quoting *Rose v. Regan*, 181 N.E.2d 796, 799 (1962)).

[5] Although such a disclaimer by an insurer may appear harsh in light of its potential effect on an injured party, the Court is mindful that "[t]he purpose of insurance is to limit one's monetary liability and protect oneself against the consequences of one's own negligence . . . ." *Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison*, 924 N.E.2d 260, 269 (2010). Thus, DaSilva's insurance policy through Travelers was intended to protect DaSilva, not those whom he may injure, which shows why DaSilva's noncooperation could ultimately cost him that protection.

Travelers argues that it is not obligated to pay Mathews' claim under DaSilva's policy because DaSilva did not cooperate with Travelers, and furthermore that Travelers was prejudiced by this lack of cooperation.[6] To establish that it was prejudiced, Travelers contends that due to DaSilva's noncooperation, it "could not prevent the entry of default judgment despite [its] good faith efforts," and DaSilva's testimony was "essential to the defense of the claim" because liability was not, and is not, reasonably clear. Travelers' Trial Mem. 3, 17. Finally, in oral argument, Travelers noted that because Rhode Island is a pure comparative negligence jurisdiction, DaSilva (and thus Travelers) would only have been responsible for Mathews' injury to the extent that DaSilva was negligent, thus making DaSilva's testimony vital.[7]

Plaintiff counters that Travelers cannot disclaim coverage because DaSilva's noncooperation can only defeat coverage if Travelers can show it was prejudiced thereby, and there can be no prejudice because Plaintiff was a passenger and cannot be at fault for this accident. Pl.'s Pre-Trial Mem. 7. Plaintiff relies on *Boyle*, wherein the court found that liability was clear in the underlying automobile accident, and therefore, there was no prejudice to the insurer by the insured's late notice of the suit related to that accident. *Id.* (citing *Boyle*, 36 N.E.3d at 1232).

[6] Travelers cites to *Morrison v. Lewis*, 221 N.E.2d 401 (1966) and *Polito v. Galluzzo*, 149 N.E.2d 375 (1958) among other cases for this proposition. In *Polito*, the court held that "the disappearance of the insured and his failure to notify the insurer of the change of address were a material breach of the cooperation clause in the policy and warranted a disclaimer." *Polito*, 149 N.E.2d at 377. Similarly, in *Morrison*, the Court found that the insured's lack of cooperation was "sufficiently substantial and material to entitle the company to make the formal disclaimer." *Morrison*, 221 N.E.2d at 404. These cases rely on the "substantial and material" standard to show noncooperation, which is no longer good law. The Supreme Judicial Court in *Darcy* added the requirement "that actual prejudice to an insurer's interests due to lack of an insured's cooperation must be demonstrated before a denial of coverage will be permitted." *Darcy*, 554 N.E.2d at 33.

[7] Travelers also argued that when the Court deemed service to have been made on DaSilva, he had a duty to send those papers to Travelers and cooperate in his defense. However, this failure is irrelevant because Travelers had notice of the suit when it received a courtesy copy of the summons and complaint on May 5, 2006. *See* Joint Statement ¶ 22.

Plaintiff further contends that DaSilva's noncooperation did not prejudice Travelers because it does not matter what DaSilva would have told Travelers regarding the accident; it only matters what Travelers believed regarding liability and points to Travelers' "Liability Serious Injury Record," where it is noted that Travelers "would settle [the injury claim] and seek contribution" and Travelers' own admission that there were no issues regarding coverage and points to the Suit Report that states the same. Joint Statement Exs. 6, 9. Finally, Plaintiff asserts that Travelers cannot deny coverage because an insurer's failure to send a reservation of rights letter to its insured waives the insurer's noncooperation defense where insurer "'exercised dominion over the case at an important point.'" *See DiMarzo*, 449 N.E.2d at 1199 (quoting *Rose*, 181 N.E.2d at 799).

Travelers can only show prejudice from DaSilva's lack of cooperation if liability is not reasonably clear in the underlying accident because under its policy with DaSilva, Travelers was obligated to pay for injury claims outside Massachusetts if DaSilva was "legally responsible for the accident." Joint Statement Ex. 3 § 13. However, the policy also required DaSilva, as an insured, to "cooperate with [Travelers] in the investigation, settlement and defense of any claim or lawsuit." *Id.* § 32. Thus, the Court must first determine if liability was reasonably clear, and if it was not, whether Travelers waived its noncooperation defense by failing to send DaSilva a reservation of rights letter.

To determine if it was "reasonably clear" that DaSilva has at least some liability in the underlying accident, the Court must determine what state's law applies.[8] Aside from Rhode Island, Massachusetts is arguably the only other state that has an interest in the determination of liability

[8] Associate Justice Keough's decision on summary judgment, as discussed above, pertained to which state's law applied to Travelers' potential liability under its policy with DaSilva. Her decision does not discuss choice of law as it concerns liability in the automobile accident, and thus, the Court must decide that for the first time.

because DaSilva resided there at the time of the accident and carried a Massachusetts insurance policy. In tort actions, the Rhode Island Supreme Court has adopted an interest-weighing test to determine which state's laws will be applied when multiple states have an interest in the case. *Oyola v. Burgos*, 864 A.2d 624, 627 (R.I. 2005) (citing *Woodward v. Stewart*, 104 R.I. 290, 299-300, 243 A.2d 917, 923 (1968)). In personal injury suits, the Court considers the following factors: "(a) the place where the injury occurred, (b) the place where the conduct causing injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and, (d) the place where the relationship, if any, between the parties is centered." *Id.* at 627. "The most important factor is the location where the injury occurred." *Taylor v. Massachusetts Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004).

In this case, the injury occurred in Rhode Island; the conduct causing the injury (the motor vehicle accident) occurred in Rhode Island; at the time of the accident, DaSilva was a resident of Massachusetts; and the parties only have a "relationship" because of this accident, which again, occurred in Rhode Island. Thus, three of the four factors, including the most important factor, favor applying Rhode Island law. The Court finds that Rhode Island has the most significant interest to the liability determination in this case and will apply Rhode Island law to determine if liability was reasonably clear in this accident.

Rhode Island law prohibits operators of motor vehicles from driving on a highway "at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance . . . ." G.L. 1956 § 31-

14-1.[9] However, "it is a long-standing principle . . . that '[t]he fact that a motor vehicle skids on a highway which is slippery is not evidence in and of itself that the vehicle was negligently handled.'" *Nationwide Prop. & Cas. Ins. Co. v. D.F. Pepper Const., Inc.*, 59 A.3d 106, 111 (R.I. 2013) (citing *Peters v. United Elec. Rys. Co.*, 53 R.I. 251, 255, 165 A. 773, 774 (1933)). Furthermore, "evidence of a rear-end collision is *prima facie* evidence of negligence, [but] it does not conclusively determine the issue of liability." *Wray v. Green*, 126 A.3d 476, 480 (R.I. 2015); *Lord v. Major*, 729 A.2d 697, 700 (R.I. 1999).

Rhode Island law makes it more likely that George Mathews, Jr. was at fault for this accident than DaSilva. Taking the police report's account of the accident that places Mathews in the second car that impacted DaSilva, the liability presumption regarding rear-end accidents in Rhode Island favors DaSilva as the first car. *See Wray*, 126 A.3d at 480; *see also* Joint Statement Ex. 1. Additionally, the Rhode Island motor vehicle code at issue here could be read to place liability on either George Mathews, Jr., DaSilva or both. *See* § 31-14-1. Secondly, DaSilva's loss of control over his vehicle on snow and slush covered roads is not evidence, by itself, of any negligence of DaSilva. *See Nationwide*, 59 A.3d at 111. Moreover, the police report does not mention that Plaintiff was even a passenger in his son's car. While the Joint Statement of Facts identifies Plaintiff as a passenger, that statement is based on the only known information to Travelers, which comes from Plaintiff and not from its insured. Theoretically, without DaSilva's version of the accident, Defendant could not argue otherwise. Thus, liability in this accident is not only not "reasonably clear" against DaSilva, but it is actually more likely that George Mathews, Jr. was liable for the accident.

[9] *See also Paolino v. MacIntyre*, wherein it was determined that slipperiness of the roads required a driver to operate at a slower speed than normal and pay more attention to the road ahead of him. *Paolino v. McIntyre*, No. C.A. 81-1588, 1985 WL 663102, at *2 (R.I. Super. Jan. 11, 1985).

Despite Mathews' assertion, his status as a passenger does not automatically equate to Travelers being required to pay his injury claim and completely ignore whether its insured was at fault for this accident. Where there are two or more potential tortfeasors, the principles of joint and several liability apply. *See* G.L. 1956 §§ 10-6-1 *et seq.* The statute defines "joint tortfeasors" as "two (2) or more persons jointly or severally liable in tort for the same injury to person or property . . . ." Sec. 10-6-2. One of the purposes of the statute is "to create a right of contribution among joint tortfeasors which did not exist at common law." *New Amsterdam Cas. Co. v. Homans-Kohler, Inc.*, 310 F. Supp. 374, 376 (D.R.I. 1970), *aff'd sub nom. New Amsterdam Cas. Co. v. Holmes*, 435 F.2d 1232, 1234-35 (1st Cir. 1970) (citing *Hackett v. Hyson*, 72 R.I. 132, 136, 48 A.2d 353, 355 (1946)). An injured plaintiff is entitled to recover 100 percent of his or her damages from any joint tortfeasor, thereby discharging the common liability of all tortfeasors and giving the paying tortfeasor a right "to seek contribution from the other joint tortfeasors according to their relative degree of fault." *Calise v. Hidden Valley Condo. Ass'n, Inc.*, 773 A.2d 834, 846 (R.I. 2001); *see* § 10-6-4.

Because DaSilva may not be liable at all for the injury to Mathews (as discussed above), Mathews was not entitled to collect his damages from Travelers under a theory of joint and several liability and then force Travelers to seek contribution from George Mathews, Jr.'s insurer. Joint tortfeasors are clearly defined in the statute as "two (2) or more persons jointly or severally liable in tort for the same injury to person or property . . . ." Sec. 10-6-2. Thus, DaSilva must have some portion of liability in this accident, however small, to be a joint tortfeasor and for Mathews to be entitled to seek all of his damages from Travelers.

There can be no question that to defend this case, Travelers needed to speak with DaSilva because there are additional reasons why liability is neither clear nor "reasonably clear" in this

case as it was in *Boyle*, discussed above. *See Boyle*, 36 N.E.3d at 1240. DaSilva was the only witness to the accident for Travelers because the only other witnesses were George Mathews, Jr. and Mathews, who were father and son, driving together in the other vehicle at the time of the accident. *See* Joint Statement ¶ 3. DaSilva's testimony was therefore "essential to the defense of the claim," as Travelers contends. *See* Travelers' Trial Mem. 17. Most obviously, DaSilva's testimony was essential because only DaSilva could give Travelers his version of the accident for Travelers to defend Mathews' claim on liability grounds; however, DaSilva's version of the accident is also important for Travelers to defend the claim on damages grounds. There is no mention of passengers in the police report from the accident, much less a description of any injuries. *See* Joint Statement Ex. 1. Without DaSilva, Travelers was left in the dark on what injuries, if any, Mathews exhibited at the scene of the accident or any movements he may have made that were inconsistent with the injuries he later claimed. Even if Travelers was later able to determine that some liability rested with its insured and it therefore decided to pay Mathews' injury claim and seek contribution, it had no way of arguing what percentage of liability should be assessed against the other driver and to what percentage of contribution it was entitled.

Plaintiff's contention that it only matters what Travelers believed regarding liability, not what DaSilva would have said, is unpersuasive. Plaintiff points to Travelers' "Liability Serious Injury Record," where it is noted that Travelers "would settle [the injury claim] and seek contribution." Joint Statement Ex. 6. This note conveys an option that Travelers was considering on the date the report was written, December 1, 2005, before Travelers knew the extent of the problems both it and Plaintiff would have in finding DaSilva.

Likewise, Plaintiff's reliance on the Suit Report that states there are "no coverage issues" is also misplaced. *See* Joint Statement Ex. 9. This report was created on May 10, 2006, only five

days after Travelers received a courtesy copy of the summons and complaint and only six months after Travelers sent its "potential suit letters" to DaSilva, one of which was returned, but the other, as far as Travelers knew at the time, had reached DaSilva. *See* Joint Statement ¶ 22, Exs. 9, 12. Therefore, Travelers was unaware of how difficult, and, ultimately unsuccessful, it would be in trying to find DaSilva and had no reason to note any coverage issue at that point. Additionally, counsel for Travelers explained at oral argument that Travelers typically notes coverage issues relating to ownership of the vehicle or, if driven by a non-owner, if permission was given to drive it.

Lastly, Travelers was prejudiced because without contact with DaSilva, there was only a limited amount its assigned counsel could do to protect DaSilva, and by extension, Travelers, from having default entered. *See* R.I. Sup. Ct. Ethics Advisory Panel, Opinion No. 2005-04 (2005). This distinguishes this case from *Boyle*, wherein the insurer had opportunities to prevent judgment from entering against its insured or to have the judgment set aside and chose not to do so. *See Boyle*, 36 N.E.3d at 1239. DaSilva's counsel, assigned by Travelers in 2005, entered a limited appearance on behalf of DaSilva and filed an objection to Mathews' Motion for Entry of Default in an attempt to prevent default from entering against him, which is the most counsel could do to aid a client with whom she had not spoken. *See* Joint Statement ¶¶ 47, 54, Exs. 17, 18. DaSilva's own noncooperation led to default and ultimately judgment entering against him and tied the hands of counsel to prevent it.

Next, the Court must determine if Travelers, although prejudiced, waived that defense by failing to send a reservation of rights letter to DaSilva. An insurer waives its noncooperation defense by failing to send a reservation of rights letter to its insured but later exercising control over the case. *DiMarzo*, 449 N.E.2d at 1199. In *DiMarzo*, the court found that the insurer

"exercised dominion over the case at an important point" where the insurer proceeded into a master's hearing without the insured. *Id.* This hearing resulted in a finding against the insured for $75,000 which was admissible as prima facie evidence of liability in a subsequent jury trial. *Id.* The only effort the insurer made to contact the insured regarding the hearing was by a letter, sent to the same address as two prior letters, one of which was signed for by someone other than the insured, and one of which was returned unclaimed. *Id.* at 1193. The third letter regarding the master's hearing, was, unsurprisingly, also returned unclaimed. *Id.* This decision by the insurer to proceed into the master's hearing "made a significant and irrevocable change in [the insured's] position without disclaiming liability or reserving [the insurer's] rights. It therefore waived the defense of noncooperation." *Id.* at 1199. The court also pointed out that the insurer is under "a duty to take affirmative steps to secure the cooperation of a vanished policyholder." *Id.*

Unlike in *DiMarzo*, counsel for Travelers did not act on DaSilva's behalf until she entered a limited appearance to object to the entry of default, *only after* numerous steps had been taken to locate DaSilva. *See id.*; Joint Statement ¶¶ 23-24, 28-30, 40, Ex. 18. It is stipulated by the parties that Travelers made "substantial efforts" and "conducted diligent searches" to locate DaSilva since 2006. Joint Statement ¶¶ 69, 71. Practically, there is nowhere for Travelers to have sent a reservation of rights letter because it could not locate its insured. Although the Court is aware of what appears to be more than a two and a half year "gap" in Travelers' efforts to find its insured before receiving a courtesy copy of the summons and complaint, the carefully worded Joint Statement of Facts prevents the Court from inferring that Travelers made no efforts at all during this time. *See* Joint Statement ¶¶ 10, 73.

Additionally, it cannot be said Travelers "exercised dominion and control" over the case when counsel entered a limited appearance for the purpose of objecting to default being entered

against its insured. Counsel for Travelers entered a limited appearance in the matter, which, again, is the most the canons of ethics would permit her to do. *See* R.I. Sup. Ct. Ethics Advisory Panel, Opinion No. 2005-04 (2005). Travelers tried to strike a balance between protecting its insured and adhering to an ethics opinion that does not permit insurance attorneys to represent those it cannot find. *See id.* Moreover, an objection to default has no possible negative consequence for DaSilva, unlike the insurer's decision in *DiMarzo* to proceed into a master's hearing that ultimately had a severe negative impact on its insured. *See DiMarzo*, 449 N.E.2d at 1193, 1199.

The Court concludes that Travelers was prejudiced by DaSilva's failure to cooperate and did not waive that defense by failing to send a reservation of rights of letter. However, even if Travelers were not prejudiced or waived its defense, the Court does not find a violation of M.G.L. ch.93A, as discussed below.

C

Alleged 93A Violations

As previously stated, a violation of M.G.L. ch.176D § 3(9) creates a right of recovery under M.G.L. ch.93A. *See* M.G.L. ch.93A, § 9(1) ("any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court . . . for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper."). A plaintiff must show how the alleged violation of M.G.L. ch.176D damaged him or her to recover under M.G.L. ch.93A. *See Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 448 N.E.2d 357, 362 (1983).

Mathews focuses on M.G.L. ch.176D §§ 3(9)(f) and 3(9)(n) to argue that he has a right to relief under M.G.L. ch.93A. Compl. ¶¶ 18, 19. Those sections state:

> "Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions:

> . . . .
>
> "(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
>
> . . . .
>
> "(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." M.G.L. ch.176D § 3(9)(f) and 3(9)(n).

Mathews did not press his M.G.L. ch.176D § 3(9)(n) argument in his Pre-Trial Memorandum of Law or in oral argument; however, the Court considers this argument sufficiently raised to be addressed by the Court, albeit briefly.

1

Failure to Effectuate Settlement

"[A]n insurer that has violated [Massachusetts General Laws Chapter] 176D, § 3(9)(f), by failing 'to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear,' by definition, has violated the prohibition in [Massachusetts General Laws] Chapter 93A, [section] 2, against the commission of unfair or deceptive acts or practices." *Hopkins v. Liberty Mut. Ins. Co.*, 750 N.E.2d 943, 950 (2001) (quoting M.G.L. ch.176D § 3(9)(f)). In determining whether an insurer's liability was reasonably clear for M.G.L. ch.176D purposes, "an objective standard of inquiry into the facts and the applicable law" must be employed. *Demeo v. State Farm Mut. Auto. Ins. Co.*, 649 N.E.2d 803, 804 (1995) (internal quotations omitted). The test is "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason, that the insurer was liable to the plaintiff." *Id.*; *see also Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 628 N.E.2d 14, 18 (1994).

When there is a dispute regarding percentages of fault, liability cannot be reasonably clear, and an insurer is not required to make an offer of settlement until both liability and damages are reasonably clear. *Bobick v. United States Fid. & Guar. Co.*, 790 N.E.2d 653, 659 (2003); *see Hopkins*, 750 N.E.2d at 951. However, '"[l]iability under [Chapter] 176D and [Chapter] 93A does not attach merely because an insurer concludes that it has no liability under an insurance policy and that conclusion is ultimately determined to have been erroneous."' *Guity*, 631 N.E.2d at 77 (quoting *Pediatricians, Inc. v. Provident Life & Accident Ins. Co.*, 965 F.2d 1164, 1173 (1st Cir. 1992)). Rather, the test is "whether *no* reasonable insurer would have failed to settle the case within the policy limits." *Hartford*, 628 N.E.2d at 18 (emphasis added). However, an insurer could also be liable under M.G.L. ch.93A if a plaintiff can show that it was "motivated by subjective bad faith," even where "on an objective standard of reasonableness, an insurer would have been warranted in not settling a case." *Hartford*, 628 N.E.2d at 19.

Mathews presses that the determination regarding a M.G.L. ch.93A violation should focus on Travelers' clear liability to Mathews and its "appreciation of that clarity." Pl.'s Pre-Trial Mem. 1-2. Mathews argues that even if liability were not clear as between the operators, Mathews could not be found liable as a passenger, and therefore, DaSilva would be obligated to pay Mathews' entire claim because of joint and several liability and then seek contribution. Pl.'s Pre-Trial Mem. 7 (citing §§ 10-6-1 *et seq.*).

As discussed above, the Court concludes that liability and damages were not reasonably clear within the meaning of M.G.L. ch.176D, and therefore, it cannot be said that "no reasonable insurer would have failed to settle the case within the policy limits." *See Hartford*, 628 N.E.2d at 18. To reiterate, liability was not "reasonably clear" against DaSilva within the meaning of M.G.L. ch.176D § 3(9)(f). First, liability in the accident must be considered under Rhode Island law.

Taking the police report's account of the accident that places Mathews in the second car that impacted DaSilva, the liability presumption regarding rear-end accidents in Rhode Island favors DaSilva as the first car. *See Wray*, 126 A.3d at 480; *see also* Joint Statement Ex. 1. Moreover, Rhode Island law on joint and several liability and driving in hazardous conditions leads to the conclusion that liability was not clear.

Second, two different arbitrations occurred, both intercompany and court-annexed, and each found different percentages of liability, adding support to Travelers' contention that liability in this accident was not certain. *See* Joint Statement Ex. 6; Pl.'s Pre-Trial Mem. 8. Importantly, liability cannot be reasonably clear when there is a dispute regarding the percentages of liability. *Bobick*, 790 N.E.2d at 659; s*ee* Joint Statement Ex. 6. Plaintiff in his Pre-Trial Memorandum of Law makes much of the fact that at the second arbitration (court-annexed), the arbitrator found zero liability on Plaintiff or on the driver of the vehicle in which Plaintiff was a passenger. *See* Pl.'s Pre-Trial Mem. 8. However, this determination was made without the benefit of DaSilva's version of the accident (and without competent cross-examination of Mathews regarding his injuries) and is, therefore, both unsurprising and unconvincing on the proposition that this finding somehow makes it more likely that DaSilva was at fault for the accident.[10] Regardless, the Court is not bound by the arbitrator's decision.

Third, the most important evidence that liability was not "reasonably clear" comes from the 93A Letter itself. The Letter's description of the accident alleges that DaSilva struck the median barrier while traveling on a snowy road, was unable to stop in time and struck Mathews' vehicle before spinning and striking Mathews a second time. *See* Joint Statement Ex. 25 at 2. It

[10] The arbitrator's finding, without the benefit of DaSilva's version of events, further supports Travelers' contention that it was prejudiced by DaSilva's noncooperation.

is unlikely that this description is a typographical error where the writer meant to say that George Mathews, Jr. could not stop in time (to be consistent with the police report) because there are numerous references in the record where Plaintiff contends that he was a passenger in a vehicle that *was struck* by an out-of-control vehicle operated by DaSilva.[11] *See* Joint Statement Ex. 1. The Letter, by its own language, conveys a second version of the accident whereby DaSilva struck the Mathews' vehicle, essentially admitting that liability is not reasonably clear.

Fourth and finally, Plaintiff's status as a passenger is not dispositive of whether liability in this accident was reasonably clear as Plaintiff contends it was.[12] Because DaSilva may not be liable at all for the injury to Mathews (as discussed above), Mathews was not entitled to collect his damages from Travelers under a theory of joint and several liability and then force Travelers to seek contribution from George Mathews, Jr.'s insurer. Joint tortfeasors are clearly defined in the statute as "two (2) or more persons jointly or severally liable in tort for the same injury to person or property . . . ." Sec. 10-6-2. Thus, DaSilva must have some portion of liability in this accident, however small, to be a joint tortfeasor and for Mathews to be entitled to seek all of his damages from Travelers.

[11] "Mathews was a passenger in a vehicle struck when DaSilva failed to maintain control of his vehicle." Pl.'s Pre-Trial Mem. 5. "George Mathews was a passenger in a car that was hit by an out-of-control driver[.]" *Id.* at 9. "when he was a passenger in a car struck by Travelers' insured." Pl.'s Pre-Trial Reply Mem. Law (Pl.'s Reply Mem.) 1 (emphasis in original removed). "George Mathews was a passenger in a car that was hit by an out-of-control driver[.]" *Id.* at 3.

[12] If liability were clear in this accident due to joint and several liability and Mathews' status as a passenger, as Plaintiff contends, then it is unclear why Mathews would not have sought to have his son's insurer pay his injury claim and seek contribution from Travelers. This scenario is particularly puzzling in light of Plaintiff's counsel's contention at oral argument that Mathews could have collected under both the uninsured and liability portions of that policy. The Court does not need to determine the accuracy of that contention.

The Court looks to Massachusetts for additional guidance on whether Plaintiff's status as a passenger renders liability reasonably clear under its own statute, M.G.L. ch.176D.[13] At least one Massachusetts court has found that an insurer was not liable for failing to settle a passenger's injury claim where liability was not reasonably clear as between the two drivers involved in the accident. *Taveras v. Rodriquez*, 2000 Mass. App. Div. 39, 2000 WL 174901, at *2 (Mass. App. Div. 2000). In *Taveras*, "the operators of the two vehicles presented diametrically opposed accounts of the circumstances and the cause of the accident in question," and there was nothing in the record to determine that it was more likely one operator caused the accident and not the other. *Id.* Given those facts, the court found the insurer did not violate M.G.L. ch.93A when it refused to pay a passenger's injury claim. *Id.* (citing *Demeo*, 649 N.E.2d at 804). Likewise, in the case at bar, there is nothing in evidence that makes it more likely that DaSilva would be more liable for the accident than Mathews; therefore, there can be no M.G.L. ch.93A violation for failure to settle a claim.[14]

For these reasons, the Court finds that liability was not reasonably clear, and thus Travelers did not violate M.G.L. ch.93A by failing to effectuate settlement under M.G.L. ch.176D § 3(9)(f).[15]

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[13] Although Massachusetts has not adopted the Uniform Contribution Among Tortfeasors Act, Massachusetts modeled its own statute, Chapter 231B, after the Act and gave a right of contribution to joint tortfeasors. *See Bishop v. Klein*, 402 N.E.2d 1365, 1371 (1980); M.G.L. ch.231B § 1(a).

[14] Both liability and damages must be clear before an insurer is required to make an offer of settlement. *See Bobick*, 790 N.E.2d at 659; *Hopkins*, 750 N.E.2d at 951. Mathews does not argue at what point damages should have been clear to Travelers. The Suit Report, prepared by Travelers on May 10, 2006, shows that Mathews' medical bills and/or records were not in Travelers' possession at that time, and thus damages could not have been reasonably clear at or before that time. Joint Statement Ex. 9. A demand letter was sent to Travelers on January 14, 2015, which includes a total amount of Mathews' medical bills; however, nowhere in the record is it clear when, or even if, Travelers ever received those bills or records. *See* Joint Statement Ex. 23.

[15] The Court is cognizant of M.G.L. ch.176D § 3(9)(d), which provides that it is unlawful to "refus[e] to pay claims without conducting a reasonable investigation based upon all available information" and notes the gap between DaSilva's last contact with Travelers on March 26, 2003,

2

Failure to Provide Explanation

M.G.L. ch.176D § 3(9)(n) makes it an unfair claim settlement practice for an insurer to fail "to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." This subsection "refers to a single instance of failing to give a reasonable explanation of the basis in the insurance policy for denying a claim. Lack of coverage or limited coverage could be a ground for such a denial." *Van Dyke*, 448 N.E.2d at 360 n.4 (citing cases).

Although Plaintiff asserts a violation of M.G.L. ch.176D § 3(9)(n) in his Complaint, Plaintiff did not press or develop this argument in his Pre-Trial Memorandum of Law or at oral argument. There are no settlement offers from Travelers in the record,[16] and the only stipulated fact or exhibit that could be construed as a denial is Travelers' M.G.L. ch.93A response. Most fatal to Plaintiff's claim under M.G.L. ch.176D § 3(9)(n) is Plaintiff's failure to articulate how this particular alleged violation damaged him, as distinct from the failure to effectuate settlement. Because Plaintiff must show that the alleged violation damaged him, and does not do so, Travelers cannot be found to have violated M.G.L. ch.176D § 3(9)(n). *See Van Dyke*, 448 N.E.2d at 362.

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and Travelers' next attempt at reaching DaSilva on December 6, 2005, by mailing potential suit letters to him. Joint Statement Ex. 5 ¶ 3, Exs. 12, 13. However, Plaintiff does not raise this issue, nor are there facts in evidence before the Court concerning whether or not Travelers attempted further contact with DaSilva during this "gap"; therefore, the Court must ignore M.G.L. ch.176D § 3(9)(d) for purposes of deciding whether Travelers violated M.G.L. ch.93A.

[16] Plaintiff's 93A Letter references a written settlement offer, but that offer is not in evidence. *See* Joint Statement Ex. 25 at 3.

IV

Conclusion

The Court finds that Plaintiff's 93A Letter to Travelers was adequate under M.G.L. ch.93A § 9(3) because it provided Travelers with a sufficient opportunity to review the facts and the law and evaluate its position on Mathews' injury claim in light of such. Travelers was clearly prejudiced by its insured's lack of cooperation and did not waive its noncooperation defense by failing to send a reservation of rights letter; however, even if Travelers was not prejudiced or waived its defense, it did not violate M.G.L. ch.176D §§ 3(9)(f) or 3(9)(n), and thus did not violate M.G.L. ch.93A. Counsel shall prepare the appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	George Mathews v. Travelers of Massachusetts a/k/a Premier Insurance Company
CASE NO:	PC-2016-4145
COURT:	Providence Superior Court
DATE DECISION FILED:	June 28, 2019
JUSTICE/MAGISTRATE:	Licht, J.
ATTORNEYS:	
For Plaintiff:	Peter J. Comerford, Esq.
For Defendant:	Ronald P. Langlois, Esq.