

## Massachusetts

### REGULATORY LIMITS ON CLAIMS HANDLING

#### Timing for Responses and Determinations

Claims for unfair or deceptive practices against insurers are governed by M.G.L. c. 176D, whereas the remedies for unfair or deceptive consumer practices are set forth in M.G.L. c. 93A (West 2004). Section 9(1) of Ch. 93A provides that any person whose rights are affected by another person violating the provisions of M.G.L. c. 176D may bring an action. Whereas a private individual may seek recovery under Section 9, businesses may only recover under Section 11 of Chapter 93A. The Supreme Judicial Court has ruled that a G.L. c. 176D claim may not be brought under Section 11. See *Jet Line Servs., Inc. v. American Employers Ins. Co.*, 404 Mass. 706, 717 (1989); *Transamerica Ins. Group v. Turner Construction Co.*, 33 Mass. App. Ct. 446 (1992). Generally, Chapter 176D, “does not create a private cause of action for injured parties.” *M. DeMatteo Const. Co. v. Century Indem. Co.*, 182 F.Supp.2d 146, 159-60 (D.Mass. Oct. 3, 2001); *Salvati v. American Insurance Company*, 855 F.3d 40, 49 (1<sup>st</sup> Cir. 2017).

Although M.G.L. c. 176D was enacted in 1947, Section 3(9) of the statute, entitled “Unfair Claim Settlement Practices,” was not added until 1972. In 1979, an amendment to Section 9 of Chapter 93A, specifically incorporating unfair insurance claim settlement practices listed in Section 3(9) of Chapter 176D as conduct violative of Chapter 93A, came into effect. This amendment expanded the class of individuals entitled to present direct actions against insurers under Chapter 93A to include third-party claimants. See *Van Dyke v. St. Paul Fire & Marine Ins. Co.* 388 Mass. 671, 675 (1983). “While the majority of c. 93A actions [relating to c. 176D] involve an insured’s attempt to enforce its rights against its own insurer, ‘the specific duty contained in subsection [3(9) ](f ) [of c. 176D] is not limited to those situations where the plaintiff enjoys contractual privity with the insurer.’” *Pacific Indem. Co. v. Lampro*, 86 Mass.App.Ct. 60, 64, 12 N.E.3d 1037 (2014), quoting *Clegg v. Butler*, 424 Mass. 413, 418, 676 N.E.2d 1134 (1997).

Although Chapter 176D §3(9) lists fourteen acts or omissions considered to be “unfair claim settlement practices,” the following are most commonly relied upon:

- Failure to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- Refusal to pay claims before conducting a reasonable investigation;
- Failure to affirm or deny coverage within a reasonable time;
- Failure to effectuate prompt, fair, and equitable settlements of claims for which liability has become reasonably clear; and
- Failure to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for the denial of a

claim or for the offer of a compromise settlement.

## Standards for Determination and Settlements

An insurer is held to a standard of reasonable conduct in the defense of its insured. *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 401, 788 N.E.2d 522, 535 (2003). Concerning settlement of claims against the insured, “[t]he test is not whether a reasonable insurer might have settled the case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits. This test requires the insured (or its excess insurer) to prove that the plaintiff in the underlying action would have settled the claim within the policy limits and that, assuming the insurer’s unlimited exposure . . . no reasonable insurer would have refused the settlement offer or would have refused to respond to the offer.” *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 121, 628 N.E.2d 14, 18 (1994).

With respect to a determination of an insurer’s duty to settle, it is well-established that an insurer’s duty to settle arises only when “liability has become reasonably clear.” See G.L. c.176D, §3(9)(f). “Liability, as the word is used in this context, ‘encompasses both fault and damages.’” *O’Leary-Allison v. Metropolitan Prop. and Cas. Ins. Co.*, 52 Mass.App.Ct. 214, 217 (2001), citing *Clegg*, 424 Mass. at 421. Accordingly, the relevant inquiry is whether the insurer reasonably believed its liability with respect to the plaintiffs claimed damages was not clear. Whether liability is reasonably clear is measured by “an objective standard of inquiry into the facts and applicable law.” *Dimeo v. State Farm Mut. Auto Ins. Co.*, 38 Mass.App.Ct. 955, 956 (1995).

Perfection is not required of insurers, and liability is not “reasonably clear” where a “good faith and factually supported disagreement” exists. *Lazaris v. Metropolitan Property and Cas. Ins. Co.*, 428 Mass. 502, 505 (1998). This is consistent with those decisions that have held that, where there are multiple reasons in support of an insurer’s evaluation of a claim, there is no violation of either G.L. c. 93A or G.L. c. 176D. See, e.g., *Bobick v. U.S. Fidelity and Guar. Co.*, 439 Mass. 652, 658-62 (2003); *Guity v. Commerce Ins. Co.*, 36 Mass.App.Ct. 339, 343-44 (1994); *Forcucci v. U.S. Fidelity and Guar. Co.*, 11 F.3d 1 (1<sup>st</sup> Cir. 1993)(recognizing that negotiation of a settlement is a legitimate bargaining process in which an insurer is only obligated to make an offer within the scope of reasonableness; reasonableness to be considered in light of the situation as a whole. In such circumstances the insurer has not violated the statute, even if a judge or jury would ultimately find the insurer’s evaluation of a claim was incorrect or low).

## PRINCIPLES OF CONTRACT INTERPRETATION

“As with any contract, in interpreting an insurance policy, we begin with the plain language of the policy.” *Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc.*, 480 Mass. 480, 485, 106 N.E.3d 572, 577 (2018), quoting *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 348, 76 N.E.3d 204 (2017).

The interpretation of an insurance policy is a question of law, and the rules of such interpretation do not differ from any other contract. *Commerce Ins. Co. v. Blackburn*, 81 Mass. App. Ct. 519, 520–521, 964 N.E.2d 1005 (2012), review denied, 462 Mass. 1105, 969 N.E.2d 717 (2012). “[E]very phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all other phraseology contained in the instrument, which must be considered as a workable and harmonious means of carrying out and effectuating the intent of the parties.” *Id.* at 521 citing *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 795, 494 N.E.2d 374 (1986). When the language of the policy is deemed explicit, the language is given its “fair meaning” in the context of the coverage at issue and is enforced in accordance with its terms. *Gordon v. Safety Ins. Co.*, 417 Mass. 687 at 689, 632 N.E.2d 1187 (1994); *Manning v. Fireman’s Fund American Ins. Companies*, 397 Mass. 38, 40, 489 N.E.2d 700 (1986).

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When construing insurance policies, the court will “interpret the words of the standard policy in light of their plain meaning, ... giving full effect to the document as a whole [,] ... consider[ing] ‘what an objectively reasonable insured, reading the relevant policy language, would expect to be covered’ ... [and] interpret[ing] the provision of the standard policy in a manner consistent with the statutory and regulatory scheme that governs such policies.” *Golchin v. Liberty Mut. Ins. Co.*, 466 Mass. 156, 159–60, 993 N.E.2d 684, 688 (2013) citing *Given v. Commerce Ins. Co.*, 440 Mass. 207, 209, 796 N.E.2d 1275 (2003).

Claims are often made asserting that a clause or term used in a policy provision creates an ambiguity. However, the principles to resolve ambiguities are well established. Where the terms of a policy are susceptible to different interpretations, the court will “construe the policy [terms] in favor of the insured and against the drafter, who is invariably the insurer, unless specific policy language is controlled by statute or prescribed by another authority.” *Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc.*, 480 Mass. at 485, 106 N.E.3d 577, quoting *Metropolitan Prop. & Cas. Ins. Co. v. Morrison*, 460 Mass. 352, 357, 951 N.E.2d 662 (2011).

Ambiguity, however, is not created due to a disagreement between the parties as to how to interpret a policy provision or term. *Suffolk Const. Co., Inc. v. Illinois Union Ins. Co.*, 80 Mass. App. Ct. 90, 94, 951 N.E.2d 944 (2011). “Nor does the mere existence of multiple dictionary definitions of a word, without more, suffice to create an ambiguity, for most work shave multiple definitions.” *Id.* at 94, 951 N.E.2d at 944, quoting *Citation Ins. Co. v. Gomez*, 426 Mass. 379, 688 N.E.2d 951 (1998).

A contractual term will be held as ambiguous, “only if it is susceptible of more than one meaning, and if reasonably intelligent persons would differ the proper meaning.” *Pan Am Railways, Inc. v. James River Ins., Co.*, 90 Mass. App. Ct. 1113, 63 N.E.3d 63 (2016), citing *McLaughlin v. Berkshire Life Ins. Co. of Am.*, 82 Mass.App.Ct. 351, 355, 973 N.E.2d 685 (2012), quoting from *Suffolk Constr. Co.*, 80 Mass.App.Ct. at 94, 951 N.E.2d 944 (2011).

## CONTRACT INTERPRETATION

### Common Issues

#### 1. Faulty Workmanship as an “Occurrence” [What is the state of the common law in your state on this subject?]

It is generally viewed that defective construction is not an accident, meaning it is not fortuitous. Under Massachusetts law, an “accident” is commonly defined as “an unexpected happening without intention or design.” *Liberty Mut. Ins. Co. v. Tabor*, 407 Mass. 354, 358 (1990)(accident implies fortuitous or unexpected event). Massachusetts courts broadly construe the term “accident” in an insurance policy. *Quincy Mut. Fire Ins. Co. v. Abernathy*, 393 Mass. 81, 83 (1984). Although the case law decision in *Friel Luxury Home Constr., Inc. v. ProBuilders Specialty Ins. Co.* RRG, No. 09-CV-11036-DPW, 2009 WL 5227893 (D. Mass. 2009) involved a liability policy, the court nonetheless observed that under Massachusetts law, faulty workmanship generally fails to constitute an accidental occurrence because “a failure of workmanship does not involve the fortuity required to constitute an accident.”

“General liability coverage is not intended as a guarantee of the insured’s work, and for that reason, general liability policies contain ‘business risk’ exclusions.” *Dorchester Mut. Fire Ins. Co. v. First Kostas Corp.*, 49 Mass. App. Ct. 651, 654 (2000). Because the “consequence of not performing properly is a part of every business enterprise,” business risk exclusions in commercial general liability policies are intended to ensure that the cost of normal business risks are borne by the insured contractor. *Commerce Ins. Co. v. Betty Caplette Builders, Inc.*, 420 Mass. 87, 92 (1995). Such “business risks” have been described as those: which management can and should control or reduce to manageable proportions; risks which management

cannot effectively avoid because of the nature of the business operations; and risks which relate to the repair or replacement of faulty work or products. These risks are a normal, foreseeable and expected incident of doing business and should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others. *Tinker*, Comprehensive General Liability Insurance—Perspective and Overview, 25 Fed'n Ins. Couns. Q. 217, 224 (1975).

As the Massachusetts Supreme Judicial Court has observed:

The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself ...

*Commerce Ins. Co. v. Betty Caplette Builders, Inc.*, 420 Mass. 87, 91 (1995)(quoting Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know*, 50 Neb. L.Rev. 415, 441 (1971 and Russ, 9A *Couch on Insurance* § 129:1 (3d ed. 1995).

In *Mello Construction, Inc. v. Acadia Ins. Co.*, 70 Mass. App. Ct. 1104, 2007 WL 2908267 (2007), the Massachusetts Appeals Court declared that a property owner's breach of contract action against a building contractor failed to seek recovery for an accidental "occurrence" under the contractor's CGL policy. The Appeals Court ruled that claims against the general contractor for the cost of repairing a defectively installed concrete slab that had been installed by a subcontractor were subject to the "business risk" doctrine. The Appeals Court rejected the insured's argument that coverage was required because the work had been performed by a subcontractor, holding that this argument confused the difference between business risks (those excluded under the policy) and liability risks (those included under the policy). See also *Davenport v. USF&G*, 56 Mass. App. Ct. 1109 (2002)(claims against a general contractor due to a negligent painting job by a subcontractor that resulted in the paint peeling and flaking did not seek recovery on account of an "occurrence").

## 2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

The Massachusetts contractor anti-indemnity statute, M.G.L. c. 149, §29C, provides:

Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property not caused by the subcontractor or its employees, agents or subcontractors, shall be void.

Massachusetts will look at the language on its face, and will not base its decision on the particular facts of the case, in examining the validity of a clause under the statute. *Harnois v. Quannapowitt Develop.*, 35 Mass. App. Ct. 286, 288 (1993).

Massachusetts courts have held that the statute, which voids on public policy grounds certain types of indemnity agreements, will only void the indemnity obligation, but will not affect a defense obligation that is part of an otherwise void clause. *Herson v. New Boston Garden*, 40 Mass. App. Ct. 779, 787 (1996). In reaching that position, the Appeals Court in *Herson* recognized that the duty to defend is "independent of and broader than the duty to

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indemnify.” *Herson*, 40 Mass. App. Ct. at 786-87. The Appeals Court recognized that Section 29C makes no explicit reference to duty to defend requirements, but is limited to indemnity requirements. *Id.* The Appeals Court looked to the absence of a reference to the defense obligation in the statute, and held that had “the Legislature wished to encompass the often utilized ‘duty to defend’ provisions within the protective ambit of Section 29C, it presumably would have said so expressly.” *Id.*

### CHOICE OF LAW

As a general rule, federal courts sitting in diversity are required to apply the choice of law rules of the forum state in which it sits to determine which state’s substantive law should be applied to a specific matter. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941). Thus, United States District Courts for the District of Massachusetts will apply Massachusetts choice of law rules in a conflict of law.

Massachusetts courts “have not elected not elected by name any particular choice-of-law doctrine.” *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E.2d 662, 668 (1985). Massachusetts has abandoned the rule of *lex loci delicti*. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. at 631. The Supreme Judicial Court of Massachusetts has stated, “we decide here not to tie Massachusetts conflicts law to any specific choice-of-law doctrine, but seek instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole.” *Id.*

Instead, Massachusetts has subscribed to a “functional choice of law approach,” and will determine the choice of law question “by assessing various choice-influencing considerations, including those provided in Restatement (Second) of Conflict of Laws (1971).” *Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. 643, 646, 632 N.E.2d 832, 834 (1994) (quoting *Bushkin Associates, Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E.2d 662, 668 (1985)).

Generally speaking, Massachusetts courts will honor choice-of-law provisions within contracts made between parties. *See Morris v. Watsco, Inc.*, 385 Mass. 672, 675, 433 N.E.2d 886, 888 (1982) (“this court has ... acknowledged and given effect to the law reasonably chosen by the parties to govern their rights under contracts.”), and cases cited therein. Courts in Massachusetts will also honor choice of law provision within contracts made between parties where the provision does not conflict with public policy. *See Northeast Data Systems, Inc. v. McDonnell Douglas Computer Systems Co.*, 986 F.2d 607, 610 (1st Cir. 1993) (citing *Morris v. Watsco, Inc.*, 385 Mass. 672, 675, 433 N.E.2d 886, 888 (1982)) (“In the absence of a conflict with public policy, Massachusetts honors choice-of-law provisions in contracts.”); *see also Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753 (2009) (“Where the parties have specifically expressed an intent as to the governing law, we respect that intent unless the result would be contrary to our public policy.”) (applying Restatement Second, of Conflicts of Laws §187).

Furthermore, where the parties to the contract have mutually agreed to have a specific state’s laws govern the contract or apply to a dispute arising therefrom, the court will honor the choice-of-law provision so long as there is a “reasonable relation” between the dispute and the chosen forum. *See, e.g., Brown Daltas & Associates, Inc. v. General Acc. Ins. Co. of America*, 48 F.3d 30, 36 (1st Cir. 1995) (“Because there is at least a ‘reasonable relation’ between this litigation and the forum whose law has been selected ... we shall forego an independent choice-of-law inquiry and look to Massachusetts law for our rules of decision.”); *Bird v. Centennial Ins. Co.*, 11 F.3d 228, 231 n.5 (1st Cir. 1993); *see also Feeney v. Dell Inc.*, 454 Mass. 192, 908 N.E.2d 753 (2009) (“Where the parties have specifically expressed an intent as to the governing law, we respect that intent unless the result would be contrary to our public policy.”) (applying Restatement Second, Conflicts of Laws § 187 (1971)).

However, courts may be reluctant to honor choice of law provisions where, at the time of negotiation, the parties

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were of unfair or unequal bargaining power. See *Taylor v. Eastern Connection Operating, Inc.*, 465 Mass. 191, n.8, 988 N.E.2d 408, 20 Wage & Hour Cas. 2d (BNA) 1617 (2013) (“A choice-of-law clause should not be upheld where the party resisting it did not have a meaningful choice at the time of negotiation—i.e., where the parties had unequal bargaining power, and the party now attempting to enforce the choice-of-law clause essentially forced the clause upon the weaker party.”).

Certain kinds of claims, however, may fall outside the scope of a contractual choice of law provision and can implicate a contracting party’s ability to assert claims under G.L. c. 93A. *ACI Worldwide Corp. v. KeyBank Nat’l Ass’n*, No. 17-CV-10662-IT, 2018 WL 3321566, at \*6 (D. Mass. June 15, 2018), report and recommendation adopted, No. 17-CV-10662-IT, 2018 WL 3321567 (D. Mass. July 5, 2018).

There is competing case law that holds that a choice of law clause specifying non-Massachusetts law may bar a 93A claim either where the choice of law clause is (1) general and applies to any claims between the parties, or (2) the focus of the 93A claim concerns wrongs related to performance of the contract no matter how the 93A claim is labeled or embroidered.

In *Mead Corp. v. Stevens Cabinets, Inc.*, 938 F. Supp. 87, 88, 31 U.C.C. Rep. Serv. 2d 443 (D. Mass. 1996), the court held that where the choice of law clause specified that “[t]his document and the sale of any products” were governed by the laws of Ohio, since the 93A claim was nothing more than a contract claim, the choice of law clause was sufficient to require Ohio law and bar the 93A claim. *Knox for Knox v. Vanguard Group, Inc.*, 2018 WL 315157, \*14 (D. Mass. 2018) (“When a Chapter 93A claim is founded on acts that resemble a traditional breach of contract, the contract’s choice of law provision applies.”); *Shri Gayatri, LLC v. Days Inns Worldwide, Inc.*, 2018 WL 1542376, \*6 (D. Mass. Jan. 5, 2018) (contractual choice of law provision specifying New Jersey law applied barring application of 93A claim, where plaintiff’s 93A claim was “just a repackaged version of its breach of contract claim.”).

Indeed, where choice of law provisions are limited and specify that the chosen forum’s law will govern the validity, interpretation, or performance of a particular contract, courts have held that such a provision does not govern choice of law for G.L. c. 93A claims.

In *Northeast Data Systems, Inc. v. McDonnell Douglas Computer Systems Co.*, 986 F.2d 607, 609–611 (1st Cir. 1993), the court held that the choice of law provision, providing that the rights and obligations of the parties would be governed by California law, applied with respect to the plaintiff’s “contract-related claims” and also “rascal-like” breach of contract claims, and held that G.L. c. 93A was inapplicable to claims based on a breach of contract action. The court further held that the choice of law provision mandating the application of California law did not apply to the plaintiff’s claims alleging fraud in the formation of the contract, and thus, G.L. c. 93A would apply to that claim. See also *VCA Cenvet, Inc. v. Winchester Veterinary Grp., Inc.*, No. 11-12123-DPW, 2015 WL 13679196, at \*7 n.6 (D. Mass. Aug. 31, 2015) (holding choice of law provision did not apply to claim for fraudulent inducement).

Similarly, in *Worldwide Commodities v. J. Amicone Co.*, 36 Mass. App. Ct. 304, 308, 630 (1994), digest opinion at 22 M.L.W. 1581 (Mass.App.), the court followed the holding in *Northeast Data*. The court held that choice of law provision specifying New York law applied only with respect to breach of contract claims and held that the choice of law provision applied “to govern both the ordinary contractual violations and the more serious ‘rascal-like’ breaches.” The court further held that “since the contract violations were at the core of Worldwide’s c. 93A claims, the contract’s choice of law clause bars application of the Massachusetts statute.” See also *Bradley v. Dean Witter Realty, Inc.*, 967 F. Supp. 19, 28–29 (D. Mass. May 30, 1997) (court followed First Circuit decision in *Northeast Data* in holding that choice of law clause did not bar 93A claim where such claim was “qualitatively

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distinct” from a related contract claim).

Furthermore, courts have also held that where a choice of law provision does not purport to declare that the rights of the parties are governed by the choice of law provision, the provision did not implicate a contracting party’s ability to assert claims under G.L. c. 93A.

In *Jacobson v. Mailboxes Etc. U.S.A.*, 419 Mass. 572, 580 (1995), the court held that “[t]he agreement does not state that the rights of the parties are to be governed by California law but only that the agreement is to be governed and construed by California law. The choice of law clause does not purport to bar the application of M.G.L.A. c. 93A to the parties’ dealings in Massachusetts.” See also *Stagecoach Transportation, Inc. v. Shuttle, Inc.*, 50 Mass. App. Ct. 812, 819, 741 N.E.2d 862, 868 (2001) (“[B]ecause the choice of law clause does not purport to declare that the rights of the parties were to be governed by New York law, the application of M.G.L.A. c. 93A to the parties’ dealings is not barred. The trial court’s determination that Shuttle’s conduct did not relate to an interpretation of the agreement, and thus governed by M.G.L.A. c. 93A, was correct.”); *L’Oreal USA, Inc. v. RG Shakour, Inc.*, 2010 WL 3504140 (D. Mass. Sept. 3, 2010) (where contract had a narrow choice of law clause providing that “[t]his Agreement construed in accordance with and all disputes herein shall be governed by the internal laws of the State of New York” the court held that “the parties’ choice of law clause does not bar L’Oreal’s Chapter 93A claims ...”).

Similarly, in *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 390 Fed. Appx. 1, 1–2 (1st Cir. 2010) (Souter, J.), the First Circuit held that a choice of law clause specifying Massachusetts law did not bar claim under the Georgia Wholesale Distribution Act, concluding that “[m]atters apart from construing ‘terms’ are ostensibly left alone, including ... post-breach statutory obligations imposed by a state other than Massachusetts.” The Court stated that the choice of law clause only provided that “Massachusetts law exclusively shall govern all terms of this Agreement, including this paragraph.” The court concluded that the choice of law clause fell short of the “plenary scope” of the choice of law clause in *Northeast Data*, which covered an “[a]greement and the rights and obligations of the parties [t]hereto.” See also *Huffington v. T.C. Group, LLC*, 637 F.3d 18, 20, 25 (1st Cir. 2011) (court held that choice of law clause providing that “the parties expressly agree that all terms and provisions hereof shall be governed, construed and enforced solely under the laws of the State of Delaware” is “addressed to interpretation and enforcement of the agreement and not to all claims ‘with respect to’ the agreement” left open the argument that Massachusetts law applied where the forum selection clause was held to specify the forum of Delaware).

A federal magistrate issued a report in *Chesebro v. Commerce Ins. Co.*, No. 17-12074 (D. Mass. July 18, 2018) recommending that a homeowner’s statutory bad faith claim pursuant to Massachusetts General Law Chapter 93A be dismissed as the insured property in Maine giving rise to the bad faith claims against Commerce are subject to Maine law. Magistrate Cabell rejected the insured’s argument that there was an express designation of Massachusetts law with respect to these claims in light of language on the Commerce web site that the insured used for tendering this first-party claim declaring that the insured’s use of the web site was subject to various terms and conditions pursuant to Massachusetts law. The court observed that the web site was one of many different options whereby an insured could present a claim and did not control the applicable law with respect to the interpretation of the policy or any claimed misconduct on the part of the insurer in its adjustment of this first-party loss. Using a Restatement analysis, the court ruled that Maine had the most significant relationship with the insured loss.

## DUTIES IMPOSED BY STATE LAW

## Duty to Defend

### 1. Standard for Determining Duty to Defend

Under Massachusetts law, “[a]n insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms.” *Billings v. Commerce Ins. Co.*, 458 Mass. 194, 200 n.6, 936 N.E.2d 408 (2010). In other words, “[t]he duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint.” *Ferreira v. Chrysler Grp. LLC*, 468 Mass. 336, 342, 13 N.E.3d 561 (2014) (quoting *Metropolitan Prop. & Cas. Ins. Co. v. Morrison*, 460 Mass. 352, 357, 951 N.E.2d 662 (2011)).

“[T]he question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions. If the allegations of the complaint are ‘reasonably susceptible’ of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense.” *Continental Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 146 (1984), quoted in *Herbert A. Sullivan, Inc. v. Utica Mutual Ins. Co.*, 439 Mass. 837, 788 N.E.2d 522 (2003).

“A duty to defend attaches when the underlying complaint shows, ‘through general allegations, a possibility that the liability claim falls within the insurance coverage.’” *Cohne v. Navigators Specialty Ins. Co.*, No. CV 17-12540-WGY, 2019 WL 688429, at \*6 (D. Mass. Feb. 19, 2019) (quoting *Billings*, 458 Mass. at 201, 936 N.E.2d at 408). “It is not necessary ‘that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage.’” *Id.*; *Scottsdale Ins. Co. v. Byrne*, 913 F.3d 221, 228 (1st Cir. 2019). Although the conjectural labels of claims are useful in examining potential coverage, the best gauge is to examine the factual allegations. See *Winbrook Communication Services, Inc. v. United States Liability Ins. Co.*, 89 Mass. App. Ct. 550, 555, 52 N.E.3d 195 (2016).

To aid in the interpretation of underlying complaint, Massachusetts court may use extrinsic facts, however, “not as independent factual predicates for a duty to defend.” *Cohne v. Navigators Specialty Ins. Co.*, No. CV 17-12540-WGY, 2019 WL 688429, at \*7 (D. Mass. Feb. 19, 2019) (quoting *Open Software Found., Inc. v. United States Fid. & Guar. Co.*, 307 F.3d 11, 15 (1st Cir. 2002) (interpreting Massachusetts law)). “Extrinsic facts are used to ‘add substance and meaning to skeletal claims only adumbrated in the complaint.’” *Id.* at \*7. “Courts are aware of the risk that extrinsic facts could be ‘misused by insureds seeking to transform a skeletal claim in the underlying complaint into an allegation arguably covered by the liability policy but unrelated to an actual claim in the complaint.’” *Id.* “An insured may not, ‘in the absence of a complaint that requires coverage, force its insurer to defend the insured by simply telling the insurer facts which would create coverage.’” *Id.* at 7 (quoting *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 15, 545 N.E.2d 1156 (1989)).

As such, “when the allegations in the underlying complaint lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate or defend the claimant.” *Timpson v. Transamerica Ins. Co.*, 41 Mass. App. Ct. 344, 347, 669 N.E.2d 1092 (1996).

Where an insurer asserts that it is not obligated to defend an insured due to a policy exclusion or

exclusions, however, the insurer bears the initial burden of proving that the exclusion applies. See *Saint Consulting Grp., Inc. v. Endurance Am. Spec. Ins. Co., Inc.*, 699 F.3d 544, 550 (1st Cir. 2012). In order to demonstrate this requirement, “the facts alleged in the third-party complaint must establish that the exclusion applies to all potential liability as matter of law.” *Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants, Inc.*, 81 Mass.App.Ct. 40, 958 N.E.2d 853, 862 (2011) (citation omitted); see also *Saint Consulting Grp.*, 699 F.3d at 550 (“If even one of the counts in either of the complaints falls within the coverage provisions but outside any exclusion, [the insurer] would have a duty to defend the entire lawsuit.”). “[W]hether an exclusion applies to relieve an insurer of its duty to defend [ ] depend[s] on whether the insured would have reasonably understood the exclusion to bar coverage.” *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 404 (1st Cir. 2009).

Where various theories, some covered and some not, relate to a common core of fact involving overlapping documents and witnesses, an insurer will be obligated to pay all defense costs unless it can show those specific costs that were totally unrelated to a covered claim. *Liberty Mutual Ins. Co. v. Metropolitan Ins. Co.*, 260 F.3d 54 (1<sup>st</sup> Cir. 2001) and *Home Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 229 F.3d 56, 65 (1<sup>st</sup> Cir. 2000).

## 2. Issues with Reserving Rights

Representation with a reservation of rights “permit[s] the insurer to assume the defense of the claim against the policyholder without waiving, surrendering, or losing the right to contend that the claim is not subject to indemnity under the policy. *Northern Sec. Ins. Co., Inc. v. R.H. Realty Trust*, 78 Mass. App. Ct. 691, 692 n.2, 941 N.E.2d 688 (2011). “The insured thus can take the necessary steps to protect his rights, and has no basis for claiming an estoppel.” *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276, 257 N.E.2d 774 (1970).

“When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation or rights or relinquish its defense of the insured and reimburse the insured for its defense costs.” *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 274 (1970). The insured can lose this right, however, if it acquiesces in the insurers’ choice of appointed defense counsel. *Herbert A. Sullivan, Inc. v. Utica Mutual Ins. Co.*, 439 Mass. 837, 788 N.E.2d 522 (2003).

To date, Massachusetts courts have declined to imply a right of recoupment. As such, where an insurer has paid defense costs under a reservation of rights, it may not recoup those costs after a court ruled that it had no duty to defend, even if it reserved this specific right in its letter. See *Millipore Corp. v. Travelers Ind. Co.*, 115 F.3d 21 (1st Cir. 1997)(no right of recoupment unless insured expressly assents). The Supreme Judicial Court ruled in *Medical Malpractice Joint Underwriting Association v. Goldberg*, 425 Mass. 46, 680 N.E.2d 1121 (1997), that an insurer’s unilateral assertion of a right to reimbursement does not give rise to any obligation on the part of the policyholder absent some express agreement on the part of the insured to do so or a policy provision compelling reimbursement. The court indicated, however, that an insurer could obtain reimbursement for a non-covered settlement, despite its policyholder’s opposition, if it first obtained court approval to proceed.

In *French King Realty Inc. v. Interstate Fire & Cas. Co.*, 79 Mass. App. Ct. 653, 948 N.E.2d 1244, 1257 (2011), however, the Massachusetts Appeals Court held that a property insurer was entitled to reimbursement for money that it had advanced to its insured for a fire loss that was later

determined not to be covered. The Court rejected the insured's argument that its insurer had waived its right to raise these defenses and was entitled to reimbursement for sums that it had advanced in the interim. In so holding, the Court quoted the decision of the lower court holding, stating that "[a]lthough no Massachusetts courts have directly addressed this issue, other jurisdictions have persuasively reasoned that an insurer is entitled to reimbursement for an erroneous payment when coverage does not exist under the policy and the insured was unjustly enriched and did not change position to its detriment in reliance on the payment," citing, e.g., *Lindsay Mfg. Co. v. Hartford Acc. & Indem. Co.*, 911 F.Supp. 1249, 1259 (D.Neb.1995), rev'd on other grounds, 118 F.3d 1263 (8th Cir.1997) ("[A]s a matter of policy, it would be unwise to discourage insurers from making payments, even if the payments were made in error, by refusing to permit later adjustments"). *Id.* at 669.

More recently, a Massachusetts trial court ruled in *Holyoke Mutual Insurance in Salem v. Vibram USA*, 2017 WL 1311937 (Mass. Super. Mar. 20, 2017), *reversed on other grounds*, 480 Mass. 480 (2018), that an insurer that defended a case under a reservation of rights and then obtained a ruling that the underlying losses were not covered had no right to recoup defense costs it had paid in the interim. In rejecting the approach pioneered by the California Supreme Court, the Superior Court declared that "a good faith demand for a defense under liability policy, which the insurer decides is likely enough to be valid, but it will tender a defense under reservation of rights, does not make retention of those defense costs just." *Id.* The court concluded that the insured had therefore not been unjustly enriched such that the insurers were entitled to restitution

### 3. Attorney's Fees

An insured who must litigate to establish the duty to defend may recover attorney's fees. See *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 686 N.E.2d 989 (1997); *Rubenstein v. Royal Insurance Co.*, 429 Mass. 355, 708 N.E.2d 639 (1999). This is true even where the insurer had commenced a declaratory judgment action to resolve a good faith dispute over its coverage obligations. *Hanover In. Co. v. Golden*, 436 Mass. 584, 766 N.E.2d 838 (2002). The court in *Hanover* held that an insured seeking attorney fees for establishing liability insurer's duty to defend does not need to show that the insurer "acted in bad faith or fraudulently, or has been stubbornly litigious," *Gamache, supra* at 96, 686 N.E.2d 989, or committed a breach of the terms of the insurance policy. See *Rubenstein, supra* at 358-359 & n. 3, 708 N.E.2d 639.3 It is immaterial whether the insurer proceeds in good faith or in bad faith to avoid the duty to defend under a liability insurance policy because "[t]o impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain." *Id.* at 360, 708 N.E.2d 639, quoting *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 329, 352 S.E.2d 73 (1986). "The entitlement of an insured to attorneys' fees and costs incurred in establishing contested coverage depends exclusively on whether that coverage is ultimately determined to exist. It does not depend on whether the denial of coverage by the insurer was reasonable or unreasonable, justified or unjustified, a close question of fact or a matter not even subject to legitimate dispute. The focus is exclusively on the bottom line." *Rubenstein, supra*, quoting *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md.App. 605, 713, 698 A.2d 1167 (1997) (emphasis added).

However, the right to recover attorney's fees in coverage litigation does not extend to the duty to indemnify. *Wilkinson v. Citation Ins. Co.*, 447 Mass. 663, 856 N.E.2d 829 (2006).

Attorney's fees may also be awarded pursuant to a statutory claim for unfair or deceptive claims practices (M.G.L. c.176D) or where the opposing party has acted vexatiously or in bad faith. *Pella Products, Inc. v. Kemper Group*, Franklin County No. 89-144 (Mass. Super. Dec. 28, 1992) (finding that insurer's failure to either defend its insured or commence a declaratory judgment action was sufficiently vexatious as to entitle the insured to an award of fees).

## State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

### 1. Criminal Sanctions

The Massachusetts Supreme Judicial Court has never declared that the common law of the Commonwealth recognizes a legally protectable right of privacy, however, since 1973, a statutorily-based right of privacy has existed in Massachusetts protecting a person's right of privacy against "unreasonable, substantial or serious interference with his privacy." M.G.L. c. 214, § 1B. The provisions of G.L. c. 214 §1B provide that:

A person shall have a right against unreasonable, substantial, or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such rights and in connection therewith to award damages.

This right to privacy however, does not extend to corporations. *See Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 50-51, 691 N.E.2d 545, 548 (1998).

The Supreme Judicial Court has yet to decide whether the privacy statute reaches attempted interference with a person's privacy. *See Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 392 n.4, 630 N.E.2d 586, 589 n.4, 9 I.E.R. Cas. (BNA) 789 (1994). *See also Bally v. Northeastern University*, 403 Mass. 713, 721 n.5, 532 N.E.2d 49, 53 n.5, 50 Ed. Law Rep. 1167 (1989) (questioning whether the privacy statute reaches attempted interference with a person's privacy). In *Bally*, the court noted that M.G.L. c. 214, § 1B prohibits "interference with one's privacy right" while the state civil rights statute, M.G.L. c. 12, § 11H, prohibits "interference and attempted interference with one's civil rights." *See Bally*, 403 Mass. at 721 n.5, 532 N.E.2d at 53 n.5 (emphasis added).

In addition, Massachusetts has enacted a data protection law: 201 CMR 17:00 Standards for the Protection of Personal Information of Residents of the Commonwealth which took effect on March 1, 2010. Widely considered one of the most comprehensive data protection and privacy law in the U.S., the regulation issued by the Department of Consumer Affairs and Business Regulation requires every business that licenses or owns personal information belonging to Massachusetts residents to comply with the minimum standards the regulation sets forth.

The regulation defines "Personal Information" as "a Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver's license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account; provided, however, that 'personal

information' shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public." 201 CMR 17:02.

The regulation's minimum standards require the implementation of a comprehensive information security programs, with appropriate administrative, technical, and physical safeguards. Furthermore, such safeguards must be consistent with those set forth in state and federal regulations to which a business is subject, including data breach notification laws, HIPAA, and the Gramm-Leach-Bliley Act.

## 2. The Standards for Compensatory and Punitive Damages

As a general matter, Massachusetts courts have held that a plaintiff is entitled to compensation "for all damages that reasonably are to be expected to follow, but not to those that possibly may follow." *Reckis v. Johnson & Johnson*, 471 Mass. 272, 299, 28 N.E.3d 445, 467 (2015).

Under the law of contracts, compensatory damages are those that remedy broken promises. *Kattar v. Demoulas*, 433 Mass. 1, 15, 739 N.E.2d 246, 258 (2000) (saying that a "fundamental principle on which the rule of damages is based is compensation. Compensation is that amount of money that reasonably will make the injured party whole. Compensatory damages may not exceed this amount. Anything beyond that amount is a windfall.") (citations omitted); *see also*, *Perroncello v. Donahue*, 448 Mass. 199, 206, 859 N.E.2d 827, 832, 2007 WL 64474 (2007) (stating that the "law of contracts is intended to give an injured party the benefit of the bargain, not the benefit of the bargain and a windfall.").

The burden of proof is on the plaintiff to prove the damages alleged to have been sustained. *E. Advert. Co. v. Shapiro*, 263 Mass. 228, 232, 161 N.E. 240, 242 (1928) (stating "it is elementary that in an action brought for breach of a contract the burden is on the plaintiff to prove the damages alleged to have been sustained"); *Kitner v. CTW Transport, Inc.*, 53 Mass. App. Ct. 741, 748–49, 762 N.E.2d 867, 873 (2002); *see generally*, §§15:8, 15:9; Am. Jur. 2d, Damages § 719; C.J.S., Damages § 305. Furthermore, a plaintiff's claim for damages "are an element of the plaintiff's case and must not be merely speculative," *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984) *see also* *Connolly v. Suffolk County Sheriff's Dept.*, 62 Mass. App. Ct. 187, 198, 815 N.E.2d 596, 605 (2004). Damages must be proven by the plaintiff with reasonable certainty. *Albert v. Zabin*, 81 Mass. App. Ct. 1109, 959 N.E.2d 458 (2012). "While mathematical accuracy of proof is not required to determine damages, a plaintiff must provide, at a minimum, some workable framework for a court to make a determination." *Id.* Otherwise, the plaintiff's damages will be too remote to be compensated. *Smith v. Jenkins*, 732 F.3d 51, 68, (1st Cir. 2013).

However, "[d]ifficulties in determining the amount of damages are not a bar to their recovery." *White v. Universal Underwriters Ins. Co.*, 347 Mass. 367, 382, 197 N.E.2d 868, 877 (1964) (citations omitted); *see also* *Robert & Ardis James Found. v. Meyers*, 474 Mass. 181, 192, 48 N.E.3d 442, 452, 2015 WL 10709688 (2016) (holding "an element of uncertainty in the assessment of damages is not a bar to their recovery.") (citations and internal quotation marks omitted).

Under Massachusetts Law, there are no punitive damages for breach of an insurance contract. *Hall v. Paine*, 224 Mass. 62, 112 N.E. 153 (1916), and punitive or exemplary damages may be awarded only by statute. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 575 N.E.2d 1107 (1991); *Pine v. Rust*, 404 Mass. 411, 535 N.E.2d 1247 (1989); *Santana v. Registrars of Voters of Worcester*, 398 Mass. 862, 502 N.E.2d 132 (1986); *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 443 N.E.2d 1308 (1983); *City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E.2d 265, 146 A.L.R.

750 (1943).

Indeed, it is a well-established rule in Massachusetts that punitive damages are not recoverable unless statutorily authorized. *Citigroup Global Markets, Inc. v. Salerno*, 445 F. Supp. 2d 124, 126–27 (D. Mass. 2006) (holding it “is a well-settled and long established principle that punitive damages may not be awarded under Massachusetts law absent statutory authority.”) (citations omitted); *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412, 995 N.E.2d 740, 753 (2013) (holding under “Massachusetts law, punitive damages may be awarded only where authorized by statute.”) (citations omitted).

A distinction exists, however, regarding damages for violations of G.L. c. 93A, “between violations that consist of unfair or deceptive acts or practice” and those violations that “are knowing or willful or actuated by bad faith. *Kapp v. Arbella Mut. Ins. Co.*, 426 Mass. 683, 686, 689 N.E.2d 1347, 1349 (1998). Damages for the former “are sanctioned by compensatory ‘single’ damages. Damage for the latter more serious violations are avowedly punitive and can be heavily so” when applied. *Id.* at 686, 689 N.E.2d 1349.

Pursuant to G.L. c. 93A, a punitive damage award, may be “up to three but not less than two times such amount” if the court finds that the insurer’s conduct was “a willful or knowing violation.” G.L. c. 93A §9. One “acts knowingly” for purposes of determining whether he is liable for double or triple damages under unfair business practices statutes, if he is aware that it is practically certain that his conduct will cause such a result. *Gore v. Arbella Mut. Ins. Co.*, 77 Mass. App. Ct. 518, 532, 932 N.E.2d 837, 850 (2010). Furthermore, a trial judge need not make an express finding that a person committed a willful or knowing violation, as long as the evidence warrants a finding of either. *Id.* at 532, 932 N.E.2d 850; G.L. c. 93A, §1 et seq.

“Bad faith may be either subjective or objective .... Subjective bad faith may be established by direct evidence that a defendant was ‘motivated by subjective bad faith,’ even where, ‘on an objective standard of reasonableness,’ he ‘would have been warranted in not settling a case.’ ... Objective bad faith may be found where a potential defendant offers ‘much less than a case is worth in a situation where liability is either clear or highly likely.’” *Parker v. D’Avolio*, 40 Mass. App. Ct. 394, 396, 664 N.E.2d 858 (1996). “[B]ad faith is ‘not simply bad judgment.’ ... ‘It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will.’” *Id.* at 396-402, 664 N.E.2d 858.

The provisions under G.L. c. 93A §9 and §11 providing for multiple damages, do not impart any guidance in awarding double or treble damages. As such, courts have interpreted this to mean the awarding of double or treble damages to be within the discretion of the court. *Evans v. Yegen Associates, Inc.*, 556 F. Supp. 1219, 1235 (D. Mass. 1982) (“In granting courts discretion to award damages of ‘up to three, but not less than two, times’ the amount of actual damages, the Massachusetts legislature clearly contemplated something other than a mechanical calculation of multiple damages”); *Computer International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 853, 443 N.E.2d 1308, 1316 (1983) (“Based on the egregiousness of each defendant’s conduct, the trial judge may assess between double and treble damages ...”); *Systems Engineering, Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1375 (D. Mass. 1983) (court rejected argument that it had no discretion and was required to award treble damages).

Furthermore, courts have been directed to interpret the language of G.L. c. 93A to award double or treble damages based on the degree of culpability of the defendant. *Computer Systems Engineering,*

*Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1375 (D. Mass. 1983); *Kilgore v. R. J. Gross Enterprises, Inc.*, 1987 Mass. App. Ct.Div 51, 59 (1987) (“[I]t is now well settled that the multiple damage provisions of c.93A are designed to impose a penalty that varies with the culpability of the wrongdoer.”); *Rini v. United Van Lines*, 903 F. Supp. 224, 233 (D. Mass. 1995), costs/fees proceeding 903 F. Supp. 234 (D. Mass. 1995), rev'd 104 F.3d 502 (1st Cir. 1997) (“Given the degree of culpability, this court will award treble damages under 93A”).

### 3. Insurance Regulations to Watch

On December 31, 2018, the governor of Massachusetts signed into law the first statute in the nation requiring registration and taxation of the short-term use residential property through websites like “Airbnb.” The new law went into effect on July 1, 2019 and requires homeowners and others allowing for short-term rentals of their property to have a one million dollar liability policy unless a hosting platform such as Airbnb maintains equal or greater coverage. See G.L. c. 175 §4F. The coverage offered by many of these hosting platforms however, do not offer coverage for property damage or bodily injury. As such, section 4F(c) requires that a hosting platform inform its users that the hosting platform provides only standard homeowners or renters insurance. See G.L. c. 175 §4F(c). Furthermore, the section includes specific reference to insurer excluding liability arising out of short-term rentals. The provision restates what the majority of homeowner policies already excluded under ISO mandatory endorsements. See G.L. c. 175 §4F(d). The provision also states, however, that “[n]othing under this section shall preclude an insurer from providing coverage for short-term rentals.” *Id.* Finally, if the insurer or the hosting platform intend to provide coverage for short-term rentals, they must file the appropriate forms with the Division of Insurance as per the statute’s directive. See G.L. c. 175 §4F(e).

The new law amended Chapter 175 by inserting after section 4E, Section 4F states as follows:

#### Section 4F.

- As used in this section, the terms “hosting platform”, “operator” and “short-term rental” shall have the same meanings as under section 1 of chapter 64G unless the context clearly requires otherwise.
- An operator shall maintain liability insurance of not less than \$1,000,000 to cover each short-term rental, unless such short-term rental is offered through a hosting platform that maintains equal or greater coverage. Such coverage shall defend and indemnify the operator and any tenants or owners in the building for bodily injury and property damage arising from the short-term rental.
- Prior to an operator offering a short-term rental through the use of a hosting platform, the hosting platform shall provide notice to the operator that standard homeowners or renters insurance may not cover property damage or bodily injury to a third-party arising from the short-term rental.
- Insurers that write homeowners and renters insurance may exclude any and all coverage afforded under the policy issued to a homeowner or lessee for any claim resulting from the rental of any accommodation under chapter 64G. Insurers that exclude the coverage described in this section shall not have a duty to defend or indemnify any claim expressly

excluded by a policy. Nothing under this section shall preclude an insurer from providing coverage for short-term rentals.

- Any policy or policy form intended to cover operators of short-term rentals from liabilities, whether the policy or policy form is provided by a hosting platform or an operator itself, shall be filed according to instructions provided by the division of insurance.
- An operator who intends to operate a short-term rental shall provide notice to any insurer that writes a homeowners or renters insurance policy for the property where such short-term rental is to be located of the operator's intent to operate such short-term rental.

#### 4. State Arbitration and Mediation Procedures

"The main purpose of [a] [contractual] arbitration provision [i]s to provide 'binding advance consent to arbitrate at the election of either party any dispute which the parties [a]re unable to settle' by agreement." *Berkshire Mut. Ins. Co. v. Burbank*, 422 Mass. 659, 661, 664 N.E.2d 1188 (1996). Furthermore, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable. G. L. c. 251, § 1.

Where parties have agreed to arbitrate, and one party has decline to proceed, the aggrieved party may move the superior court for an order compelling arbitration. G. L. c. 251, § 2. In the event that parties cannot agree on an arbitrator, or where the "appointed arbitrator fails or is unable to act," parties may see seek the appointment of an arbitrator from the superior court. G. L. c. 251, § 3.

Arbitration awards are subject to very limited judicial review. *Weiner v. Commerce Ins. Co.*, 78 Mass. App. Ct. 563, 565, 940 N.E.2d 1246, 1249 (2011). A reviewing court is strictly bound by an arbitrator's finding and legal conclusions even if they appear erroneous, inconsistent or unsupported by the record at the arbitration hearing. *Lynn v. Thompson*, 435 Mass. 54, 61, 754 N.E.2d 54, 60 (2001). Absent fraud, errors of law are a factor insufficient to set aside an award. *Id.* However, the issue of whether an arbitrator acted in excess of his authority is always open to judicial review. *BHA v. National Conference of Firemen and Oilers*, 458 Mass. 155, 161, 935 N.E.2d 1260, 1265 (2010).

An arbitrator exceeds his authority by granting relief beyond the scope of the arbitration agreement ...[,] by awarding relief beyond that to which the parties bound themselves ...[,] or by awarding relief prohibited by law." *Superadio Ltd. Partnership v. Winstar Radio Prod., LLC*, 446 Mass. 330, 334, 844 N.E.2d 246 (2006), quoting from *Plymouth–Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990). "Arbitration, it is clear, may not 'award relief of a nature which offends public policy or which directs or requires a result contrary to express statutory provision' ... or otherwise transcends the limits of the contract of which the agreement to arbitrate is but a part." *Ibid.*, quoting from *Lawrence v. Falzarano*, 380 Mass. 18, 28, 402 N.E.2d 1017 (1980).

An arbitration award may be vacated, however, where the arbitrator exceeded their authority by: (1) granting relief beyond the scope of the arbitration agreement; (2) awarding relief beyond that which the parties agreed to be bound by: and (3) issuing an award prohibited by law or public policy. *Weiner* 78 Mass. App. Ct. at 566, 940 N.E.2d at 1249.

Failure to object to a request for arbitration, however, may result in a waiver. *Lumbermens Mut. Cas.*

*Co. v. Malacaria*, 40 Mass. App. Ct. 184, 188–191, 662 N.E.2d 241 (1996). Where a party participated in an arbitration without raising the issue that no arbitration agreement existed, the party is estopped to subsequently raise the issue in an effort to vacate the arbitration award. *Turner Fisheries v. Seafood Workers Union*, 19 Mass. App. Ct. 925, 927 (1984).

In terms of the implications of a G.L. c. 93A award, where an arbitration clause forces an insured to litigate an unfair practice claim in the courts after a successful outcome in an arbitration proceeding, the arbitration award itself is not a basis upon which a punitive damage award may be made pursuant to G.L. c. 93A, § 9(3). *White v. Safety Ins. Co.*, 65 Mass. App. Ct. 607, 610–611, 843 N.E.2d 82 (2006). Indeed, an arbitration award is not “judgment” within meaning of G.L. c. 93A, § 9. *Bonofiglio v. Commercial Union Ins. Co.*, 411 Mass. 31, 37-38, 576 N.E.2d 680 (1991).

In contrast to arbitration, mediation is non-binding on the parties, and the mediator does not decide the claim. In Massachusetts, there are no rules or statutes regarding mediation procedure, however, there is a mediation privilege statute providing that all communications with mediators remain confidential and are not subject to disclosure in any judicial or administrative proceeding. *See* G.L. 233 § 23C.

Under the local rules of the United States District Court for the District of Massachusetts, parties to an action pending in the district court may petition the court for submission of a case to mediation and the court may appoint a magistrate judge to act as a mediator. *See* Rule 16.4(C)(4) of the Local Rules of the United States District Court for the District of Massachusetts.

The Supreme Judicial Court, has also adopted Uniform Rules on Dispute Resolution that govern dispute resolution services in civil and criminal matters. S.J.C. Rule 1:18, Rule 1. Massachusetts implemented in part on June 1, 1998 the Uniform Rules on Dispute Resolution, which provide for mandatory participation in non-binding dispute resolutions services.

### 5. State Administrative Entity Rule-Making Authority

The Massachusetts Division of Insurance (DOI) administers the Commonwealth’s laws regarding the regulation of the insurance agency. The DOI monitors financial solvency, license insurance companies and insurance producers, reviews and approves insurance rates and forms, and coordinates the takeover and liquidation of insolvent insurance companies and the rehabilitation of financially troubled companies. The DOI also investigates and enforces state laws and regulations pertaining to insurance and is responsible for responding to consumer inquiries and complaint.

The DOI has the legal authority to conduct hearings, issue orders and decisions, and promulgate regulations pertaining to the business of insurance.

## EXTRACTIONAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

### Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

#### 3. First Party

Good faith has been defined as the insurer making settlement decisions without regard to the policy limits and the insurer's "exercise of common prudence to discover the facts as to liability and damages upon which an intelligent decision may be based." *Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56, 60, 734 N.E.2d 726, 730 (2000) (citing *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 119, 628 N.E.2d 14 (1994)).

Implicit in every contract between an insurer and an insured in Massachusetts is a covenant of good faith and fair dealing. See *Thaler v. American Ins. Co.*, 34 Mass.App.Ct. 639, 644, 614 N.E.2d 1021, 1023, n. 3 (1993), *overruled on other grounds by*, *Laxaris v. Metropolitan Property & Cas. Ins. Co.*, 428 Mass. 502, 703 N.E.2d 205 (1998). Accordingly, under Massachusetts law, "[a]n obligation to deal with the insured with 'candor and fairness' is inherent in any contract of insurance." *Green v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 47 Mass.App.Ct. 443, 446, 713 N.E.2d 992, 996 (1999).

To recover for breach of the implied covenant of good faith and fair dealing, an insured must show that the insurer's conduct was not only improper but unreasonable. Where there is no coverage, there can be no bad faith. Attorney's fees are not recoverable to a prevailing first party insured unless the insurer's misconduct constitutes an independent violation of the claims standards set forth in G. L. c. 176D for which recovery is permitted under G. L. c. 93A.

In *Hartford* the court held that "[t]he negligence standard by which the actions of an insurer concerning settlement will be tested hereafter will be in practice not significantly different from the good faith test that has been evolving in this Commonwealth." *Id.* at 121. The court held that the negligence standard to be applied in determining whether an insurer has breached its duty to an insured with respect to settlement of the underlying suit, requires the insured to prove that the plaintiff in the underlying action would have settled the claim within the policy limits and that assuming the insurer's unlimited exposure (viewing the question from the point of view of the insured) no reasonable insurer would have refused the settlement offer or would have likewise refused to respond to the offer.

#### 4. Third-Party

"Good faith" has been defined as the insurer making settlement decisions without regard to the policy limits and the insurer's exercise of common prudence to discover the facts as to liability and damages upon which an intelligent decision may be based. *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 119, 628 N.E.2d 14, 17 (1994). "So long as the insurer acts in good faith, the insurer is not held to standards of omniscience or perfection; it has leeway to use, and should consistently employ, its honest business judgment. *Peckham v. Continental Cas. Co.*, 895 F.2d 830, 835 (1st Cir. 1990).

The Supreme Judicial Court ruled in *Clegg v. Butler*, 424 Mass. 413, 676 N.E.2d 1134 (1997) that even tort claimants had a right to pursue a Section 9 claim for violations of Chapter 176D based upon an insurer's failure to make a prompt offer of settlement in cases where both liability and damages were reasonably clear. Only policyholders, however, may bring a claim under Section 3(9)(g). See *Jacobs v. Town Clerk of Arlington*, 402 Mass. 824, 829, 525 N.E.2d 658, 661 (1988) (Section 3(9)(g) "creates no rights in persons other than the insured"). Furthermore, in *Rurak v. Medical Professional Mutual Insurance Company*, 02-12274 (D. Mass. May 19, 2003), the court granted partial summary judgment to an insurer, dismissing claims asserted by a third party

claimant under Subsection 3(g) of Chapter 176D as that remedy is limited to “insureds” that are required to sue to recover benefits owed under a policy.

The Appeals Court ruled in *Silva v. Steadfast Ins. Co.*, 876 Mass. App. Ct. 1121, 31 N.E.3d 76 (2015), review denied, 473 Mass. 1103 (2015) that an accident victim could not bring suit against the tortfeasor's liability insurer for failing to make a post-verdict offer of settlement where the plaintiff itself had appealed the trial court's dismissal of numerous parts of his case. Under the circumstances, the court ruled that the plaintiff's appeal, which left open issues with respect to the scope of damages and liability, precluded liability for any claimed violation of G.L. c. 176D, Section 3(9)(f) as the scope of damages were not “reasonably clear” until the conclusion of the appeal. The court emphasized the limitations of its ruling, taking note of the fact that the plaintiff was not seeking recovery against Steadfast based upon the failure to make an offer of settlement prior to the original verdict. The court also rejected Steadfast's argument that Silva, an individual who was seeking both personal and business-related damages, should only be entitled to seek recovery under Section 11.

Judge Mastroianni ruled in *Jiminy Peak Mountain Resort, Inc. v. Wiegand Sports, LLC*, 2016 WL 1050260 (D. Mass. Mar. 16, 2016) that a liability insurer had no duty to defend an entity that claimed that it was a third party beneficiary of the coverage by reason of its contractual relationship with Navigator's named insured.

## Fraud

In order to succeed on a claim of fraud the plaintiff must show that the defendant made a false representation of a material fact with knowledge of its falsity, for the purpose of inducing the plaintiff to act, and that the plaintiff relied on the misrepresentation to his detriment. See *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703, 322 N.E.2d 768 (1975). Massachusetts requires that allegations of fraud be pled with particularity. *Mass. R. Civ. P. 9(b)*.

An insured's misrepresentations to its insurer will void coverage if the misrepresentations were material and intentional. Thus, G.L. c. 175 §186(a) states:

No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.

Although the statute only applies to misrepresentations in a policy application, the same standard has been applied by Massachusetts court to misrepresentations to insurers in the course of a loss investigation. For instance, Massachusetts court have ruled that an insured that knowingly exaggerates the value of a first party loss waives its right to coverage even if did not intend ultimately to obtain more than fair compensation for this actual loss. See *Gechijian v. Richmond Ins. Co.*, 298 Mass. 487 and 305 Mass. 132; *Harold J. Warren, Inc. v. Federal Mutual Ins. Co.*, 386 F.2d 579 (1st Cir. 1967).

In Massachusetts, “[s]tatements made in an application for insurance are in the nature of continuing representations and speak from the time the application is accepted or the policy is issued.” *Hanover Ins. Co. v. Leeds*, 42 Mass. App. Ct. 54, 57 (1997) (citations omitted). “A misrepresentation in an application for insurance will enable the insurer to avoid the policy if the misrepresentation was made with actual intent to deceive, or it is material.” *Id.* See also G.L. c. 175, § 186(a).

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It has always been the law of Massachusetts that a surety or indemnitor could avoid a judgment rendered against the principal or indemnitee, by showing that it was procured by collusion or fraud. *Airway Underwriters v. Perry*, 362 Mass. 164, 168, 284 N.E.2d 604 (1972); *Espinal v. Liberty Mutual Ins. Co.*, 47 Mass. App. Ct. 593, 714 N.E.2d 844 (1999). However, pursuant to G.L. c. 175, §113A(5), neither fraud in securing a compulsory insurance policy nor a breach of that policy by an insured can be claimed as a defense by the insurer to bar recovery by a judgment creditor under a reach and apply action.

However, if the fraud alleged is that no accident had occurred, this type of fraud may be raised as a defense to a reach and apply action where there has been a default judgment entered. “While compulsory insurance is designed to protect innocent travelers, those travelers are not innocent if they file fraudulent claims. Moreover, if [it were] held the law to be otherwise, it would open the floodgates to fictitious claims based on phantom accidents, requiring payments to those persons involved in a fraud. *Espinal v. Liberty Mutual Ins. Co.*, 47 Mass. App. Ct. at 598. The court did however provide guidance for future controversies where prior to the initiation of the underlying judgment, if the insurer has a belief that no accident occurred, the insurer should bring a declaratory judgment action naming both the insured and claimant as parties. *Id.* at 599.

### Intentional or Negligent Infliction of Emotional Distress

In order to recover for Negligent Infliction of Emotional Distress (NIED), a plaintiff must prove: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 132, 605 N.E.2d 805 (1993).

To prove a successful claim for the Intentional Infliction of Emotional Distress (IIED), a plaintiff must show: (1) outrageous conduct; (2) intention to cause or reckless disregard to causing emotional distress; (3) severe or extreme emotional distress; and (4) actual and proximate cause. *Howcroft v. Peabody*, 51 Mass.App.Ct. 573, 596, 747 N.E.2d 729 (2001).

Whether certain conduct can be characterized as extreme and outrageous necessarily depends on the facts of each case. *Simon v. Solomon*, 385 Mass. 91 (1982). It is not enough that a plaintiff experiences fear or worry. *Id.* To be actionable, this distress must be of such intensity and duration that no reasonable person could be expected to endure it. *Boyle v. Wenk*, 378 Mass. 592 (1979). The conduct must be beyond all possible bounds of decency and utterly intolerable in a civilized community. *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145 (1976).

### State Consumer Protection Laws, Rules and Regulations

The Massachusetts Consumer Protection Act, M.G.L. c. 93A (West 1984), provides a remedy for consumer who are injured by a wide array of unfair or deceptive trade practices. Private individuals may seek relief under Section 9 of the Act but must first set forth their claims in a demand letter. Businesses may only seek recovery under Section 11 but are not required to issue an initial demand letter.

Under Massachusetts law, a claimant must show that there was a causal connection between the deceptive acts and that the loss was foreseeable as a result of that act. *Kohl v. Silver Lake Motors*, 369 Mass. 795, 800 (1976) and *Lord v. Commercial Union Insurance Company*, No. 00-P-1655 (Mass. App. Ct. January 8, 2004).

No action may be brought under Section 11 “unless the actions and transactions constituting the alleged unfair methods of competition or the unfair or deceptive act or practice occurred primarily and substantially within the Commonwealth.” The First Circuit has ruled that this question should be addressed by balancing the location of

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(1) the defendant's deceptive conduct; (2) the location of the plaintiff when deceived; and (3) the location of the plaintiff's losses. *Clinton Hospital Assn. v. Corson Group, Inc.*, 907 F.2d 1260 (1st Cir. 1990) and *Roche v. Royal Bank of Canada*, No. 96-1748 (1st Cir. 1997).

The statute of limitations for c. 93A claims is four years.

## DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

### Discoverability of Claims Files Generally

A single justice of the Appeals Court of Massachusetts has declared that a medical malpractice carrier had no duty to disclose its claim file to a third-party tort claimant on the basis of the insurer's alleged failure to settle the case in which liability was claimed to be reasonably clear. In *Guevara v. Med. Prof'l Mut. Ins. Co.*, No. 03-J-486, 2003 WL 23718323 (Mass. App. Ct. Oct. 24, 2003), Associate Justice Mason ruled that the information in the file was protected by the work product doctrine as to which the claimant had not made a particularized showing of need or unavailability from other sources. The court also declared that communications from defense counsel to the insurer were subject to the attorney-client privilege as, under Massachusetts law, defense counsel also has an attorney-client relationship with the insurance company that retains it to represent a policyholder.

The First Circuit ruled in *Vicor Corp. v. Vigilant Ins. Co.*, 674 F.3d 1 (1st Cir. 2012) that the trial court had erred in quashing the insurers' request for access to privileged communications from Vicor's defense counsel. The court held that even if the insurers were defending under a reservation of rights or otherwise disputing their coverage obligations, the common interest doctrine required that they be given access to these materials. The court took particular note of the fact that the insured had already supplied various communications marking them as "privileged and confidential" so as to preclude discovery by third parties. The court declared that in such circumstances the plaintiff could not have it both ways as it could not make use of the benefit of the common interest exception to avoid waiver of the attorney/client privilege as to third parties while simultaneously asserting the privilege against the parties with whom they share a common interest.

### Discoverability of Reserves

In *Savoy v. Richard A. Carrier Trucking, Inc.*, 176 F.R.D. 10, 15 (D. Mass. Nov. 6, 1997), the federal district court ruled that an insurer must reveal the amount of reserve that it set for a case where the carrier's conduct was alleged to have been in bad faith. Similarly, in *Kay Construction Corporation v. Control Point Associates, Inc.*, 2003 WL 22285925, (Mass. Super. Aug. 4, 2003), the court held that the plaintiff was "entitled to the disclosure of information related to the reserves established for this case, but not the amount of reserves." *Id.* at \*2.

In *Rhodes v. AIG Domestic Claims, Inc.*, 2006 WL 307911, \* 12 (Mass. Super. Jan. 27, 2006), in determining the relevancy of information related to reserves in an unfair claims settlement practice claim, the court held:

To the extent that the defendants are contending that reserve information may never be disclosed, even within those parameters, because the information is not relevant, this Court rejects that contention. Even if the reserve amount were to be found by the trial judge not to be admissible into evidence, it would still be relevant to the case and reasonably likely to lead to the discovery of admissible evidence, since the plaintiffs would be permitted to explore in deposition with the person establishing the reserve limit the

reasons for setting that amount.

*Id.* at \*5. Furthermore, the court also held that information related to the reserves set for a particular claim would constitute opinion work product “when the reserve is set during or in anticipation of litigation.” *Id.* at \*12.

In *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, No. CV 07-10930-NMG, 2009 WL 10692782 (D. Mass. July 1, 2009), the court held that factual circumstances in the contested documents evidenced that the defendant made the redacted entries regarding the reserve amounts in anticipation of litigation. *Id.* at \*5. Furthermore, the court held that the “information contained in the non-redacted portions of the documents, such as the dates of the increases in reserves reduce[d] the substantial need for the actual amount of the reserves.” *Id.*

## Discoverability of Existence of Reinsurance and Communications with Reinsurers

The one Massachusetts decision addressing the question regarding the discoverability of re-insurance held that re-insurance agreements are discoverable under Rule 26(b)(2), although the decision pointed out that the particular case in which the discovery was sought was an insurance coverage dispute and that one of the defendant insurers in the case had publicly raised financial concerns that raised an issue about its potential insolvency. See *Neles-Jamesbury, Inc. v. Liberty Mut. Ins. Co.*, No. 020982A, 2007 WL 4099341 (Mass. Super. Oct. 15, 2007) (holding that discovery of reinsurance agreement is permitted under Rule 26 where relevant to coverage issues in dispute). In its discussion of the issue regarding the discoverability of re-insurance agreements, the court noted that a majority of those courts “recognize the difference between re-insurance agreements and other types of communications between the insurers and their reinsurers.” *Neles-Jamesbury, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 4099341, at \*1.

## Attorney/Client Communications

The attorney client privilege “extends to all communications made to an attorney or counsellor ... and applied to by the party in that capacity, with a view to obtain his advice and opinion in matters of law, in relation to his legal rights, duties and obligations, whether with a view to the prosecution or defense of a suit or other lawful object.” *Hanover Ins. Co.*, 870 N.E.2d at 1111 (quoting *Hatton v. Robinson*, 31 Mass. 416, 421 (1834)). The privilege attaches to any communication between attorney and client in confidentiality for the purpose of seeking, obtaining or providing legal advice or assistance. In *Re Reorganization of Elec. Mut. Ins. Co., Ltd. (Bermuda)*, 425 Mass.419, 681 N.E.2d 838, 840 (1997).

“While the attorney-client privilege shields communications between attorney and client (and in some cases third parties), the work product doctrine protects an attorney’s written materials and ‘mental impressions.’ ” *Comm’r of Revenue v. Comcast Corp.*, 453 Mass. 293, 901 N.E.2d 1185, 1200 (2009) (citing *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Codified in Mass. R. Civ. P. 26(b)(3), the doctrine protects from discovery documents prepared by a party’s representative “in anticipation of litigation.” *Id.* at 314, 901 N.E.2d 1185.16 The protection can be overcome if the party seeking discovery demonstrates “substantial need of the materials” and cannot obtain the “substantial equivalent” by other means without undue hardship. *Id.* Finally, an attorney or other representative’s “mental impressions, conclusions, opinions, or legal theories” are afforded greater protection than “fact” work product, *id.*, which includes “everything else that is eligible for protection as work product...” In *Re Grand Jury Subpoena*, 220 F.R.D. 130, 145 (D.Mass. Mar. 16, 2004).

## DEFENSES IN ACTIONS AGAINST INSURERS

### Misrepresentations/Omissions: During Underwriting or During Claim

Pursuant to Massachusetts statute, a misrepresentation made in the negotiation of a policy of insurance will not provide a basis to deny coverage unless it is made with actual intent to deceive or such misrepresentation increased the risk of loss. In this regard, G.L. c. 175, §186 provides that:

No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.

It is well established in Massachusetts that "[a] material misrepresentation by the applicant may void an insurance policy." *Barnstable County Ins. Co. v. Gale*, 425 Mass. 126, 128-29. 680 N.E.2d 42, 44 (1997). The two prerequisites that must exist in order to successfully assert the defense of misrepresentation are: (1) that the misrepresentation be material; and (2) that the misrepresentation increased the risk of loss. See *Kobico, Inc. v. Pipe*, 44 Mass. App. Ct. 103, 110 and n.10, 688 N.E.2d 1004, 1009 (1997) (recognizing distinction between common law concept of materiality and statutory concept of increased risk of loss under G.L. c. 175, §186 and requirement of both to void policy). "A fact 'must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium.'" *Employers' Liab. Assur. Corp. v. Vella*, 366 Mass. 651, 655, 321 N.E.2d 910, 913 (1966), quoting *Daniels v. Hudson River Fire Ins. Co.*, 66 Mass. 416 (1853). Whether a misstatement in an application for insurance increased the risk of loss and was, therefore, "material" is ordinarily a question of fact, *Schiller v. Metropolitan Life Ins. Co.*, 295 Mass. 169, 177 (1936), on which the insurer bears the burden of proof. *McDonough v. Metropolitan Life Ins. Co.*, 228 Mass. 450, 452 (1917).

### Failure to Comply with Conditions

Insurer must prove prejudice in order to avoid coverage on the basis of most policy condition, including late notice. M.G.L. c.175 §112. *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185 (1980). Note that this requirement only applies to claims arising after 1977, when the common law was amended.

Prejudice is not required (or will be presumed as a matter of law) in cases where expenses or liabilities were voluntarily incurred by the insured without the knowledge or consent of the carrier. *Augat, Inc. v. Liberty Mutual Ins. Co.*, 410 Mass. 117 (1991)(breach of cooperation clause).

### Challenging Stipulated Judgments: Consent and/or No-Action Clause

Massachusetts courts have recognized the right of policyholders to enter into agreements with tort claimants wherein they assign their contractual and bad faith rights in return for an agreement by the plaintiff not to execute upon a judgment against them. *Bolden v. O'Connor Café of Worcester, Inc.*, 98-P-1817 (Mass. App. September 8, 2000) and *Campione v. Wilson*, 422 Mass. 185, 190-194 (1996). In such circumstances, the defendant is free to challenge the claim on the basis of collusion.

### Preexisting Illness or Disease Clauses

Under Massachusetts law, pursuant to G. L. c. 175 §132(2) an insurance policy must contain "[a] provision that

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the policy shall be incontestable after it has been in force during the lifetime of the insured for a period two years from the date of issuance.” G. L. c. 175 §132(2). This, however, is subject to exceptions for non-payment, violations of conditions relating to military service during war, disability benefits, and additional accidental death benefits. *Id.*

The status is “designed to require the insurer to investigate and act with reasonable promptness if it wishes to deny liability on the ground of false representations or warranty by the insured. It prevents an insurer from lulling the insured, by inaction, into fancied security during the time when facts could be best ascertained and proved, only to litigate then belatedly, possibly after the death of the insured. The insurer, within the period prescribed by the policy, must contest the policy, that is, must set up its invalidity in some judicial proceeding, by way of either of attack or defense.” *Metropolitan Life Ins. Co. v. De Nicola*, 317 Mass. 416, 418, 58 N.E.2d 841 (1944).

It has not been decided whether the contestability provision required by G.L. c. 175, § 132 is a statute of limitations subject to tolling, or, rather, if it is a statute of repose that extinguishes a cause of action after the two year period. *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 631 n.20, 682 N.E.2d 624 (1997).

### Statutes of Limitations and Repose

The statute of limitations for a breach of contract claim is six years. The statute of limitations for a G.L. c. 93A claim is four years.

## TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

### Trigger of Coverage

Coverage is triggered on the date that the complaining party is “actually damaged.” *Lumbermens Mutual Cas. Co. v. Belleville Industries, Inc.*, 407 Mass. 675, 687 (note 10), 555 N.E.2d 568, 575-576 (1990); *Continental Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 152, 461 N.E.2d 209, 215 (1984). As the Supreme Judicial Court of Massachusetts recognized in *Belleville*, “[a] crucial factor in determining when an injury occurs for purposes of insurance coverage is the nature of the injury.” 407 Mass. at 687-88.

In *Trustees of Tufts University v. Commercial Union Ins. Co.*, 415 Mass. 844, 616 N.E.2d 68 (1993), the Supreme Judicial Court ruled that (1) “manifestation” is not the sole trigger of coverage in Massachusetts and (2) that coverage for an environmental clean-up claim may be triggered in years preceding the plaintiff’s purchase of the polluted property if the insured can prove that the property itself was damaged then. However, the court acknowledged that the burden of proving property damage in such policy years lies with the policyholder. In rejecting “manifestation” as the sole trigger for pollution claims, the SJC implied that coverage should be triggered by “injurious exposure” but noted that different triggers may be applied to different types of injury and property damage. The court declined to be more specific in this case, however, since it found that the insurers’ policy obligations would be triggered under either “exposure,” “injury in fact” or “continuous trigger.”

### Allocation Among Insurers

As yet, the Supreme Judicial Court has not addressed this issue. The Appeals Court ruled in *Rubenstein v. Royal Ins. Co.*, 44 Mass. App. Ct. 842, 694 N.E.2d 381 (1998), *review denied* (Mass. 1999) that a trial court did not abuse her discretion in refusing to apportion the insured’s damages among all of the years in which pollution occurred.

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As the trial court had concluded that property was continuously being contaminated by the leakage of oil during Royal's 1969-72 policy, the Appeals Court ruled that it was this continuous exposure to contaminants that was decisive and that Royal's claim for allocating damage awards among other years of coverage must fail. *See also Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyds*, 01-P-645 (Mass. App. Ct. October 17, 2003)(applying Illinois law, court refused to find that the insurer's policy obligations are limited to liability for property damage occurring during the policy period or that the policies required pro-ration among triggered policies).

### CONTRIBUTION ACTIONS

#### Claim in Equity vs. Statutory

Equitable contribution is the right to recover from a co-obligor who shares such liability with the party seeking contribution. *Lexington Ins. Co. v. General Accident Ins. Co. of America*, 338 F.3d 42, 50 (1st Cir. 2003).

To recover under common law indemnity, the party seeking indemnification must demonstrate that the opposing party was solely negligent. "At common law a person may seek indemnification if that person does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another." *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 369, 479 N.E.2d 1386 (1985) (internal quotations and citations omitted). "Indemnity allows a party 'who is without fault ... to recover from the wrongdoer the entire amount of his loss.'" *Orient Overseas Container Line v. John T. Clark & Sons of Boston, Inc.*, 229 F. Supp.2d 4, 16 (D. Mass. 2002), quoting *Slocum v. Donahue*, 44 Mass. App. Ct. 937, 693 N.E.2d 179 (1998).

A person who negligently causes injury to a third person, however, is not entitled to indemnification from a joint tortfeasor. *Fireside Motors, Inc. v. Nissan Motor Corp.*, 395 Mass. 366 at 369, 479 N.E.2d 1386. *See also, Ferreira v. Chrysler Group LLC*, 468 Mass. 336, 13 N.E.3d 561 (2014); *South Shore Hellenic Church, Inc. v. Artech Church Interiors, Inc.*, 2016 WL 696085 (D. Mass. 2016), report and recommendation adopted, 183 F. Supp. 3d 197 (D. Mass. 2016).

Furthermore, under common law indemnification, a party can recover its legal fees and costs. The court held as such in *Decker v. Black and Decker Mfg. Co.*, 389 Mass. 35, 40, 449 N.E.2d 641 (1983), holding "[t]he general rule in Massachusetts is that if a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own and is found liable, such other party is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense." *See also, Ferreira v. Chrysler Group LLC*, 468 Mass. 336, 13 N.E.3d 561 (2014) ("... the right to indemnity is limited to those cases where the person seeking indemnification is blameless, but is held derivatively or vicariously liable for the wrongful act of another."); *James-Brown v. Commerce Ins. Co.*, 85 Mass. App. Ct. 1111, 5 N.E.3d 970 (2014); *Scott v. Restaurant Technologies, Inc.*, 2015 WL 1962128 (D. Mass. May 1, 2015).

In *Lexington Ins. Co. v. General Accident Ins. Co.*, the First Circuit held that Lexington, an excess professional insurer had no contractual or equitable obligation to contribute to a share of defense costs where its policy plainly manifested an intention not to pay these costs and that, in the face of such clear language, the doctrine of equitable contribution could not be relied on to compel payment. 338 F.3d 42 (1<sup>st</sup> Cir. 2003).

Contribution, however, "is based on the shared fault of the joint tortfeasors. *Slocum v. Donahue*, 44 Mass. App. Ct. 937, 939, 693 N.E.2d 179 (1998). Massachusetts General Laws chapter 231B §1(a) provides, "where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them. G.L. c. 231B,

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“Contribution claims arise when ‘two or more persons become jointly liable in tort for the same injury.’” *South Shore Hellenic Church, Inc. v. Artech Church Interiors, Inc.*, 2016 WL 696085, at \*19 quoting Mass. Gen. L. ch. 231B, § 1; see also *LeBlanc v. Logan Hilton Joint Venture*, 974 N.E.2d 34, 42 (Mass. 2012) (“[w]ithout liability in tort there is no right of contribution”) (quoting *Berube v. Northampton*, 602 N.E.2d 560, 562 (Mass. 1992)). “Under long-established Massachusetts law, causation in tort must be proved by a preponderance of the evidence.” *South Shore Hellenic Church, Inc. v. Artech Church Interiors, Inc.*, 2016 WL 696085, at \*19 quoting *Lynch v. Merrell-Nat'l Laboratories, Div. of Richardson-Merrell, Inc.*, 830 F.2d 1190, 1197 (1st Cir. 1987).

The Supreme Judicial Court of Massachusetts ruled that a policyholder’s failure to give notice to a worker’s compensation insurer did not preclude another carrier from obtaining equitable contribution for an injury that was covered by both policies. On a certified question from the First Circuit, the court ruled in *Insurance Company of the State of Pennsylvania v. Great Northern Ins. Co.*, SJC 11897 (Mass. March 7, 2016), that it would not recognize a “selective tender” exception to equitable contribution, declaring such an exception is contrary to Massachusetts workers compensation law as well as principles of liability insurance and public policy. Specifically, the court found that the Massachusetts comp statute gave rise to an obligation on the part of the insurer once the employer received a claim from its injured employee and that its obligations were not dependent on whether the employer gave notice to the insurer.

### Elements

The District Court for the District of Massachusetts in *In re Atl. Fin. Mgmt., Inc., Sec. Litig.*, 603 F. Supp. 135, 137 (D. Mass. Jan. 15, 1985), in enumerating the elements of a claim for contribution held that, “[t]he viability of a claim for contribution depends upon three elements: (1) the existence of “overlapping liability” of two persons; (2) support in the controlling body of substantive law for distribution of the burden of loss between the two; and (3) the availability of a procedural avenue for advancing the claim between them. *Id.* at 137.

### DUTY TO SETTLE

Once insured's liability for a particular claim has become reasonably clear, the insurer has a duty under Massachusetts law to make a fair offer to settle the claim and to do so promptly. This duty is imposed on all insurers by statute. See G.L. c. 176D, § 3(9)(f); *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 566–567, 750 N.E.2d 943, 952 (2001).

In many cases it is also an implicit part of the insurer's contractual obligations. When insurance policy imposes a duty to defend on an insurer, that duty carries with it an implicit obligation “to make reasonable, prudent efforts to settle” the claims against the insured. *Boyle v. Zurich American Ins. Co.*, 472 Mass. 649, 659, 36 N.E.3d 1229, 1239 (2015); accord *Murach v. Massachusetts Bonding & Ins. Co.*, 339 Mass. 184, 186–187, 158 N.E.3d 338, 341 (1959) (duty to defend includes duty “to act in good faith” to settle claims). Thus, where liability has become reasonably clear, an insurer with a duty to defend also has a duty “to settle the case within the ... policy limits when it had the opportunity to do so.” *Medical Malpractice Joint Underwriting Ass'n of Massachusetts v. Goldberg*, 425 Mass. 46, 60 n.33, 680 N.E.2d 1121, 1130 (1997).

An insurer that violates its duty to make reasonable efforts to settle a claim may be sued in contract for breaching the insurance policy, in tort for negligently breaching its duty to settle, or for violating G.L.c. 93A by committing an unfair claims settlement practice in violation of G.L. c. 176D. See generally *Boyle, supra*, at 654–55 & 659, 36 N.E.3d at 1239 (contract claim); *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 116, 120–21 628 N.E.2d 14, 17 (1994) (negligence claim); *Rhodes v. AIG Domestic Claims, Inc.*, 461 Mass. 486, 494 (2012) (claim under G.L.c.

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93A, § 9); *Silva v. Steadfast Ins. Co.*, 87 Mass.App.Ct. 800, 803–04 (2015) (claim under G.L.c. 93A, § 11).

If an insurer breaches its duty to settle a claim, the insured party may recover from the insurer for “all losses” that were “foreseeable consequences” of the failure to settle, even if those losses exceed what is covered by the insurance policy. *DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 101–02 (1983). For example, “[i]f the insurer violated the law in failing to settle for the policy limits, then the insurer will be liable to the insured for the damages exceeding the policy limit.” *Gore v. Arbella Mut. Ins. Co.*, 77 Mass.App.Ct. 518, 526 (2010); *accord Boyle*, 472 Mass. at 654 & 660. The losses recoverable by the insured include all consequential damages caused by the insurer's breach of its duty to settle; the insured's recovery is not limited to compensatory damages awarded against it in the underlying tort action. *See, e.g., Rivera v. Commerce Ins. Co.*, 84 Mass.App.Ct. 146, 149 (2013) (insurer liable for litigation expenses incurred by insured after breach of duty to settle).

This rule, that an insurer that breaches a duty to settle a claim is liable for all consequential damages suffered by its insured, applies whether the insurer is found liable for breach of contract or for engaging in unfair or deceptive conduct in violation of G.L.c. 93A. *See Boyle*, 472 Mass. at 659–60 & n.15 (breach of contract damages); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 762–64 (1993) (breach of contract damages); *DiMarzo, supra* (c. 93A damages).

## LH&D BENEFICIARY ISSUES

### Change of Beneficiary

Massachusetts General Laws Chapter 175 §123 provides in pertinent part:

“No life insurance company shall accept or take action on any written request to change the designation of beneficiary under any policy of life or endowment insurance unless the signature of the person requesting the change is witnessed by a disinterested person. For purposes of this section, a disinterested person is one who is over eighteen years of age and not designated as a beneficiary in the requested change. Upon receipt and acceptance of the change of designation of beneficiary, the insurance company shall provide written notice of the change to the insured at the owner's last known address.”

As such, in order to change the beneficiary designation on a policy of life insurance, the person requesting the change must sign such a request witnessed by a disinterested person, who is over the age of eighteen years of age and is not the designated beneficiary of the requested change *See* G.L. c. 175, §123.

### Effect of Divorce on Beneficiary Designation

Under Massachusetts law, upon the granting of a divorce, the former spouse of a group hospital, surgical, medical, or dental insurance plan prior to the issuance of said divorce judgment will remain eligible for benefits after the issuance of the divorce. *See* G.L. c. 175, §110I(a); G.L. c. 176B §6B(a). The former spouse remains eligible for benefits under the health insurance plan whether or not the divorce judgment entered prior to the effective date of said plan, and the former spouse may be maintained on the plan without any additional premium or examination. *See* G.L. c. 175, §110I(a); G.L. c. 176B §6B(a). The former spouse's eligibility remains the same “as if said judgment had not been entered,” and continues until the remarriage of either part. *Id.*

In the event of the remarriage of the health insurance group member, the former spouse will have the right to continue to be eligible for benefits, by the means of the addition of a rider to the family plan, or the issuance of an individual plan, at a rate determined by the health insurance provider, and so long as the continued eligibility

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for coverage is provided for in the divorce judgment. See G.L. c. 175, §110(b); G.L. c. 176B §6B(b).

As for life insurance benefits, under Massachusetts Law, life insurance may be ordered by the court as a security for alimony in the event of the payor's death during the alimony period. See G.L. c. 208 §55(a). Orders to maintain such life insurance may be based on the following factors: age and insurability of the payor, cost of the insurance, amount of the judgment, policies carried during the marriage, duration of the alimony, prevailing interest rates and other obligations of the payor spouse. See G.L. c. 208 §55(b). The court's order to maintain reasonable security for alimony in the event of the payor's death may be modified upon a material change in circumstance. See G.L. c. 208 §55(c).

Congress intended to preempt entire area of law concerning treatment of social security old age benefits as part of marital estate by providing disability and old age benefits for divorced spouses, based on covered spouse's social security insurance, when covered spouse begins collecting retirement or disability benefits, providing that divorced spouse is at least 62 years old, has not remarried, and was married to covered spouse for at least ten years before divorce. See *Mahoney v. Mahoney*, 425 Mass. 441, 681 N.E.2d 852 (1997). Federal law prohibits social security old age benefits from being included as an asset in a marital estate. *Id.*

In construing Massachusetts G.L. c. 208, § 34, the Supreme Judicial Court in *Mahoney* held that:

G.L. c. 208, §34 confers broad discretion on a judge to make an equitable property division in connection with a divorce. The statute provides that, when dividing the marital estate, a judge may include as part of the marital estate any vested and nonvested retirement (including pension) benefits of either spouse. (citations omitted).

*Mahoney v. Mahoney*, 425 Mass. 441, 443, 681 N.E.2d 852, 854 (1997). While anticipated social security old age benefits may not be included as part of marital estate, they may be considered as a factor in making equitable distribution of marital assets; there is no requirement as to precisely how a judge must consider anticipated social security benefits. *Id.*

## INTERPLEADER ACTIONS

### Availability of Fee Recovery

In *John Hancock Life Ins. Co. v. Flaherty*, 81 Mass. App. Ct. 1120, 962 N.E.2d 763 (2012), the appeals court affirmed the awarding of attorney's fees in the contract of a Rule 22 interpleader action. See also *Chartrand v. Chartrand*, 295 Mass. 293, 297 (1936) (judge retains discretion to award attorney's fees and costs to the stakeholder in an interpleader action). See also, e.g., *Sun Life Assur. Co. of Canada v. Sampson*, 556 F.3d 6, 8 (1st Cir. 2009) (holding that "a federal court has discretion to award costs and counsel fees to the stakeholder in an interpleader action whenever it is fair and equitable to do so.").

"Such attorney's fees are appropriate when 'the party initiating the interpleader (1) is disinterested, (2) admits liability, (3) deposits the fund in the court, and (4) has asked to be relieved of any further liability.'" *U.S. Foodservice, Inc. v. Daignault*, No. CIV. 10-40103-FDS, 2011 WL 576606, at \*2 (D. Mass. Feb. 9, 2011).

Conversely, the First Circuit has held that there are two categories where an interpleading party is not usually allowed attorney's fees: (1) where the party acts in bad faith; and/or (2) where the party is not disinterested, but benefits, beyond resolutions of the issues from the litigation. *Sun Life Assur. Co. of Canada v. Sampson*, 556 F.3d 6 at 8.

### Differences in State vs. Federal

Rule 22 of the Massachusetts Rules of Civil Procedure, which is identical to Rule 22 of the Federal Rules of Civil Procedure, allows an insurer to file interpleader actions in state courts in order to resolve multiple adverse claimants. *Sav. Bank Life Ins. Co. of Massachusetts v. Fleming*, No. CV 16-10535-FDS, 2016 WL 7197370, at \*4 (D. Mass. Dec. 9, 2016) citing to Mass. R. Civ. P. 22.