COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

DOUGLAS M. RAWAN and KRISTEN A. RAWAN,

Plaintiffs/Appellants,

v.

CONTINENTAL CASUALTY CO.,

Defendant/Appellee.

Case No. 2018-P-0933

ON APPEAL FROM A JUDGMENT OF THE
MASSACHUSETTS SUPERIOR COURT
(WORCESTER DIVISION, C.A. No. 2011-CV-01605)

BRIEF OF APPELLANTS, DOUGLAS M. RAWAN AND KRISTEN A. RAWAN

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STATEMENT OF ISSUES ON APPEAL

1. M.G.L. c. 176D, §3(9)(f) obligates Massachusetts insurers to effectuate a prompt, fair and equitable settlement after liability has become reasonably clear. Continental marketed a professional liability policy in Massachusetts that gave its insured absolute veto power over the settlement process, regardless of how unreasonable the insured's settlement position was. Did such a policy violate c. 176D, and thereby M.G.L. c. 93A, as a matter of law?

2. Was Continental's repeated attempts to hide critical evidence from the Rawans and their counsel at the same time that Continental was asking the Rawans to mediate their claims consistent with a Massachusetts insurer's duties under c. 176D and M.G.L. c. 93A?

3. M.G.L. c. 176D, § 3(9)(d) requires a Massachusetts insurer to promptly conduct a reasonable investigation based upon all available information. Continental failed to investigate the Rawans' damages claim for almost a year after a report commissioned by Continental established its insured's liability. Did

Continental's delay violate c. 176D, and thereby M.G.L. c. 93A?

4. M.G.L. c. 176D, § 3(9)(a) prohibits a Massachusetts insurer from misrepresenting insurance coverage. Continental misrepresented its insured's coverage by 100% during the same period that it was asking the Rawans to mediate. Does Massachusetts recognize an exception to c. 176D, § 3(9)(a) for a coverage misrepresentation that the insurer later claims was unintentional error?

5. Would an unintentional error exception protect a Massachusetts insurer that refused to produce its insured's policies and declarations pages in discovery, and that disclosed its insured's actual policy coverage only after being ordered to do so by the Superior Court?

STATEMENT OF THE CASE

This an appeal from an October 25, 2017 order of the Superior Court (Reardon, J). denying plaintiffs' motion for summary judgment under M.G.L. c. 93A and c. 176D against Continental Casualty Company ("Continental") for unfair settlement practices, and granting Continental's cross-motion for summary judgment.

The case was commenced by the plaintiffs, Douglas and Kristen Rawan ("the Rawans") on August 15, 2011 against Kanayo Lala ("Lala"), Continental's insured, alleging breach of contract, professional negligence, and unfair and deceptive business practices. The claims arose out of Lala's work as the structural engineer on the Rawans' residential construction project. (Docket No. 1). (R.A. Vol. I, p. 33). Lala filed and served his Answer on September 13, 2011 (Docket No. 4). (R.A. Vol. I, p.40).

At all times relevant hereto, Lala was insured under a professional liability policy issued by Continental. On September 7, 2012, LeClair Ryan, P.C. attorneys hired by Continental ("LeClair Ryan") entered an appearance for Lala. A final pretrial conference was held on June 4, 2013. Further final trial conferences were held between March 25, 2014 and September 18, 2014.

The Rawans amended their Complaint on February 4, 2013 to include Continental as a defendant under G.L. c. 93A, § 9 and c. 176D, § 3. (Docket No. 16). (R.A. Vol. I, p. 206). The Rawan's claims against Continental were stayed pending resolution of the underlying claims against Lala.

The case was tried before a jury commencing September 26, 2014. On October 1, 2014, the jury returned a verdict in favor of the Rawans in the amount of $400,000. On April 1, 2015, the court (Sullivan, J.) issued Findings of Fact, Rulings of Law, and Order on Plaintiffs' G.L. 93A Claim in the amount of $40,000 (Docket No. 59). (R.A. Vol. II, p. 40). On the same date, Judgement entered in favor of the Rawans in the amount of $400,000, together with pre-judgment interest in the amount of $174,116.59, plus $40,000 under c. 93A, plus interest in the amount of $8,705.83. (Docket No. 60). (R.A. Vol. II, p. 52). On July 2, 2015, the court awarded the Rawans attorney's fees in the amount of $87,725.00 (Docket No. 62.1). (R.A. Vol. II, p. 54).

Continental offered to settle the Rawans' claims for $100,000 after suit was filed, later reducing the offer to $35,000 just prior to trial. Both offers were authorized by Lala at the time they were made. Prior to Continental's initial $100,000 settlement offer, Lala advised Continental, "I have attached my acknowledgment and I believe this is a confirmation to invoke my policy rights to get this claim resolved. *Please proceed as you consider the most efficient*

resolution." (S.J. Ex. 78). (R.A. Vol. III, p. 515)(Emphasis added).

On August 20, 2015, Continental filed its Answer to the Rawan's c. 93A/c.176D claims. Docket No. 70). (R.A. Vol. II, p. 82). On April 19, 2016, the Rawans moved for summary judgment, and Continental cross-moved for summary judgment. (Docket No. 77.1–77.13). (R.A. Vol. II, p. 98—-R.A. Vol. XI, p. 177).

On November 17, 2016 and June 13, 2017, the court (Reardon, J.) heard oral argument on the cross motions. (Docket No. 83). (R.A. Vol. XI, p. 260). On October 25, 2017, the Court issued an Order denying plaintiffs' motion and granting defendant's motion. (Docket No. 86, 87). (R.A. Vol. XI, p. 268, Vol. XI, p. 278).

On November 20, 2017, the court issued an Amended Judgment Order, stating, "[j]udgment is hereby entered for the defendant Continental Casualty Co. as to any and all claims, including, but not limited to, G.L. c. 93A and c. 176D claims brought by the plaintiffs Douglas M. Rawan and Kristen A. Rawan against defendant Continental Casualty Co." (Docket No. 88). (R.A. Vol. XI, p. 280).

The Rawans' Notice of Appeal entered on December 20, 2017 (Docket No. 89) and this appeal was docketed in Appeals Court on June 29, 2018. (R.A. Vol. XI, p. 288). By letter dated August 9, 2018, the Rawans were notified by Prosecuting Counsel for the Commonwealth of Massachusetts Division of Professional Licensure that, "based on your complaint, the Board initiated formal proceedings which have ultimately resulted in the revocation of Mr. Lala's license to practice as an engineer in the Commonwealth." (R.A. Vol. XI, p. 295).

STATEMENT OF THE FACTS

In October 2005, the Rawans hired Lala, a Massachusetts licensed civil engineer, to design the structural members for their new home. (R.A. Vol. II, pp. 40-41). Lala prepared, stamped and filed structural drawings with the Town of Westborough. *Id.* In preparing his structural drawings, Lala used flawed calculations which significantly underestimated building loads and stresses. As a consequence, multiple beams and joists installed in the Rawans' home did not meet minimum building code requirements, resulting in cracking and settling at multiple locations. (R.A. Vol. II, p. 66).

Between 2005 and 2011, Lala stamped and filed eleven construction control reports with the Town of Westborough Building Commissioner that falsely certified that work on the Project had been performed in compliance with Massachusetts State Building Code, and in accordance with the architectural plans of record. (R.A. Vol. III, p. 16).

In December 2010, Douglas Rawan raised then obvious structural issues directly with Lala and demanded that Lala correct the conditions. The Rawan e-mail confirmed a prior conversation with Lala in which Lala admitted to his miscalculations. (R.A. Vol. III, p. 587).

For all relevant periods, Lala was the named insured under Continental Professional Liability Policy No. 00-613-89-06 ("the Continental Policy"). (R.A. Vol. III, p. 44 and p. 51). Lala's 2004—2011 Continental policies consistently insured him up to $500,000 per claim and $1,000,000 per claim year. At no time prior to 2012 was Lala's insurance coverage less than $500,000/$1,000,000.

In August 2011, after Lala failed to adequately address the structural issues in the Rawans' home, the Rawans filed suit in the Worcester Superior Court,

asserting claims against Lala for professional negligence, negligent supervision, breach of contract, and violations of c. 93A. (R.A. Vol. III, p. 70). The Rawan's claims relied on the professional opinion of Neil Mitchell ("Mitchell"), a consulting engineer hired by the Rawans to peer review Lala's work. Mitchell prepared a preliminary report in April 2012 that found material errors and deficiencies in Lala's structural calculations.

In January 2012, Continental retained LeClair Ryan to represent Lala. (R.A. Vol. III, p. 79). Leclair Ryan was provided with a copy of Mitchell's April 2012 report. In June 2012, LeClair Ryan advised Continental that "[t]here is 0% chance at settling this case for under $100,000." (R.A. Vol. III, p. 88).

In July 2012, Continental engaged a consulting engineer, Thomas Hager, P.E., to independently peer review Lala's work. The Rawans gave Hager full access to their home with the express understanding that Continental would share Hager's findings with the Rawans and their counsel. (R.A. Vol. III, p. 92).

Hager reviewed Lala's plans, met with both Lala and Mitchell, toured the Rawan home, and performed his

own independent structural calculations. [1] (R.A. Vol. III, p. 101 and p. 104).

On August 6, 2012, Jack Donovan ("Donovan"), a Continental claims adjuster, advised the Rawans' counsel that Continental expected to receive Hager's findings within ten days. (R.A. Vol. III, p. 132). On August 30, 2012, Donovan advised Lala that, "[Hager] has not issued any formal report but has expressed concerns about your engineering services." (R.A. Vol. III, p. 137). In response, Lala directed Continental to "proceed as you consider the most efficient resolution" in resolving the action. (R.A. Vol. III, p. 143).

In September 2012, Hager delivered his peer review report to Continental. Hager's cover letter enclosing the report advised:

> Bottom line, I found the same serious design errors as Neal Mitchell and some

[1] On August 4, 2012, Mitchell provided his final peer review report to all parties, including Hager. The report identified multiple significant structural design errors and recommended necessary fixes to repair the structural deficiencies. The Mitchell peer review concluded: "*this was the worst example of improper engineering that I have seen in my 45 years of professional practice*." (R.A. Vol. III, p. 118). Mitchell later testified at trial consistent with his peer review report. The Trial Court found Mitchell's testimony credible in all respects. (R.A. Vol. III, p. 16).

> additional ones as well as overstresses in the repaired beams that Neal did not get involved with. Sorry for the news but I have to say I side with Neal Mitchell's conclusions and concerns for the structural adequacy of this house.

(R.A. Vol. III, p. 150). Hager's report found that Lala's structural design work did not satisfy minimum strength and deflection requirements of the Massachusetts Building Code, that Lala failed to follow sound structural engineering practices, and that Lala's work did not meet the minimum acceptable standards of practice for structural engineers in the Commonwealth of Massachusetts. (R.A. Vol. III, p. 155).

Reneging on its prior agreement, Continental refused to provide a copy of the Hager report to the Rawans or their counsel. (R.A. Vol. III, p. 157—-R.A. Vol. III, p. 166). LeClair Ryan then refused to produce Hager for his deposition after Hager was duly served with a subpoena, claiming for the first time that Hager was a "mediator" under G.L. c. 233, § 23C. (R.A. Vol. III, p. 168).

In the period leading up to Hager's Report, Continental repeatedly attempted to get the Rawans to

mediate their claim, including offering proposed names of mediators and alternative dates. (R.A. Vol. III, p. 132). None of the "mediators" proposed by Continental included Hager. During the same period of time, Continental's counsel represented to the Rawans' counsel that Lala had $250,000/$500,000 in coverage under his policy. (S.J. Ex. 14, 31). (R.A. Vol. III, p. 132, 241).

The coverage representation was false. Lala gave notice of the Rawan claim to Continental on November 25, 2011. (Donovan Aff., para. 2). (R.A. Vol. III, p. 329). Lala's policy limits from January 1, 2004 through December 31, 2012 was consistently $500,000/$1,000,000. Lala's policy limits did not decrease to $250,000/$500,000 until January 1, 2012. (R.A. Vol. IV, pp. 95, 117, 125).

The Rawan's counsel served interrogatories and document requests seeking Lala's policies and declarations pages. Continental's counsel objected to the discovery requests as "not relevant." (R.A. Vol. IX, p. 205, 221). The Rawans moved to compel the discovery, which Continental opposed. (R.A. Vol. I, p. 229). Only after the Superior Court ordered Continental to supplement its discovery responses on

June 5, 2013 did Continental disclose that Lala's coverage was twice what Continental had represented while it was attempting to secure the Rawans' assent to a speedy mediation. (R.A. Vol. I, p. 338).

On October 1, 2012, the Rawans sent separate c. 93A demand letters to both Continental and Lala. The letter attached Mitchell's report with an itemization of damages totaling $272,890. (R.A. Vol. III, p. 177) The Trial Court subsequently found that the "particularized list of damages" which the Rawans included with their October 1, 2012 demand letter provided "an opportunity to review the facts and law involved" to determine if the Rawans' demand should be granted or denied. (R.A. Vol. III, p. 17, 22).

The October 1, 2012 demand letter advised Continental that the Rawans' house was experiencing additional cracking. The letter advised Continental that it would be liable for future damage to the Rawans' home. (R.A. Vol. III, p. 179). Continental's response on October 9, 2012 denied liability and falsely claimed that the demand failed to reasonably describe the wrongful acts the Rawans complained of. (R.A. Vol. IX, p. 221). Continental's response falsely branded Hager as a "third-party neutral and

conciliator" in an effort to hide Hager and his report from discovery. Continental's response included no settlement offer. *Id.* at p. 221.

At the time that Continental sent its c. 93A response, Continental had no factual basis to challenge the Rawans' damages claim because it had taken no steps to estimate the cost of structural repairs identified in the Mitchell and Hager peer review reports. (R.A. Vol. III, pp. 119, 153).

On November 15, 2012, Continental was ordered to produce a copy of the Hager report to the Rawans' counsel and to make Hager available for deposition. (R.A. Vol. III, p. 227). On November 29, 2012, Lala's counsel offered the Rawans $100,000 to settle all claims against him. (R.A. Vol. III, p. 234). The November 29, 2012 settlement offer was not based on any analysis or data performed by Continental.

At the time that Continental made the November 29, 2012 settlement offer, Continental had no factual basis to challenge the Rawans' damage claim, and had taken no steps to place a repair value on any of the structural deficiencies identified in the Mitchell and Hager peer review reports. (R.A. Vol. III, pp. 119, 153).

The Rawans responded to the offer requesting a tender of Lala's policy. *Id.*; *see also* Email (R.A. Vol. III, p. 236). At that time that the Rawans demanded a tender of the policy, Continental had misrepresented Lala's policy coverage limits. (R.A. Vol. III, p. 241, 246).

On January 25, 2013, after being ordered to answer coverage interrogatories under oath, Continental admitted that Lala's coverage limits were $500,000/$1,000,000. (R.A. Vol. III, p. 249).

In a March 2013 email, Lala's counsel wrote in an email to Continental:

> Although the actual damages have not been monetized by any party, there is no real dispute that significant structural issues remain. If the house needs to be torn down and rebuilt, the cost could approach $1 million. If the issues can be remedied without a total rebuild, rough estimates are obviously lower, likely in the $650k - $850k range.

(R.A. Vol. III, p. 253). The email chain continued:

> It will be difficult to challenge liability. Primarily, Mr. Hager- brought in by Jack Donovan as an independent "fresh set of eyes" to evaluate the engineering issues, found the insured's engineering calculations to be erroneous to significant degrees, and that the structure as built does not meet code requirements by significant margins. Finding a credible

> expert to reach a different conclusion is unlikely.
>
> Second, even if the structural errors were the result of poor construction by the contractor, the insured's signing of the contraction control reports that construction was (for the most part) acceptable and code-complaint largely conveys ownership of construction issues to the insured, and negates his "passing the buck" to the contractor.
>
> All that having been said, it may be useful for Mr. Hager or another engineer to evaluate the cost of repairs to counter the estimate provided by plaintiff.

(R.A. Vol. III, p. 251-52).

On May 6, 2013, the Rawans presented an amended damages demand of $1,324,390. The May 6, 2013 letter identified multiple instances of worsening conditions at the Rawans' home. (R.A. Vol. III, p. 284). The revised demand was based on an itemized contractor's estimate, and an estimate by Mitchell for engineering fees necessary to oversee the repairs. *Id*. at p. 285.

Rather than respond to the Rawans with a reasonable settlement offer, Continental engaged Lisa Davey, a structural engineer, who was first identified by Continental at the final pretrial conference in June 2013. Davey's engagement letter stated her intent to perform a full peer review of Lala's work. (R.A. Vol. III, p. 287). Continental's counsel subsequently

instructed Davey to perform a limited review instead. (R.A. Vol. III, p. 295). Prior to June 2013 – a full two years after the Rawans brought suit—-Continental never investigated the cost to repair the Rawans' home.

Davey performed an engineering review of Lala's structural engineering work consistent with the limitations placed on her engagement by LeClair Ryan. LeClair Ryan was aware of the limitations in Davey's review work and reported those limitations to Continental:

> While Ms. Davey is a good witness, she will not be able to support [Lala's] standard of care and ***her damages assessment, of $120,000.00, does not take into account the impact that such work would have on the house as a whole and is very vulnerable on that front. As you know, we retained her after we were brought into the case and after discovery has closed as the best effort we could put forward to attempt to minimize awardable damages.*** Again, not a strong defense but that is the lay of the land that Mr. Lala has presented to us all.

(Emphasis added). (R.A. Vol. III, p. 299).

Despite her narrowed engagement, Davey concluded that Lala's design work failed to meet the minimum strength and deflection requirements of the Massachusetts Building Code. (R.A. Vol. III, p. 296).

("According to her calculations, a number of members were within code allowances, but the properties of some others exceeded those limits.").

Davey prepared a summary repair estimate based on her limited engagement in a report dated August 20, 2013. (SJ Ex. 116, p. 9). (R.A. Vol. IV, p. 12). Davey's "$100,000 - $120,000" repair estimate was based on a single telephone call with an out-of-state estimator who never inspected the property. (SJ Ex. 130, at 86:16-87:20). (R.A. Vol. IV, pp. 133-34). Davey had no understanding of how the estimator arrived at his estimates. (SJ. Ex. 130, p. 87:05-08). (R.A. Vol. IV, p. 134). Davey could only estimate that her phone call was "probably more than 15 minutes." (SJ Ex. 130, p. 87:24-88:2). *Id.* Davey took no notes during her call with the estimator. (p. 89:9-11). *Id.* at p. 136. The estimator never provided Davey with a written estimate, nor did she ever ask him to. (p. 90:1-5). *Id.* at p. 137.

On December 2, 2013, Continental renewed its $100,000 settlement offer based on Davey's admittedly incomplete repair estimate. (R.A. Vol. III, p. 303). The Rawans rejected the offer by letter dated December 4, 2013. (R.A. Vol. III, p. 305).

In a January 7, 2014 litigation report prepared for Continental, LeClair Ryan projected the chance of a defense verdict at 10 percent, with an estimated verdict range from $125,000–500,000. (R.A. Vol. III, p. 309). On March 31, 2014, LeClair Ryan warned of the strong likelihood of a plaintiff's verdict, writing: "potential six—-or even seven—-figure verdict against you.... Difficult case to win and to keep any awarded damages to a minimum." (R.A. Vol. III, p. 317).

In September 2014, one day prior to trial, LeClair Ryan decreased the settlement offer from $100,000 to $35,000 plus an offer for Lala to continue providing structural engineering services to the Rawans. (R.A. Vol. III, p. 323). The Rawans rejected the offer.

A jury subsequently found that Lala was professionally negligent in performing services for the Rawans, and awarded the Rawans' $400,000 in damages, or 11.4 times the amount of the final pre-trial offer and 4 times the earlier settlement offer. (R.A. Vol. III, p. 325). The jury, in an advisory verdict, also found that Lala liable under G.L. c. 93A. *Id.*

On April 1, 2015, the trial judge issued a Findings of Fact, Rulings of Law, and Order on Plaintiffs' G.L. c. 93A, § 9 claim, finding that Lala violated c. 93A by filing intentionally misleading and reports with the Town of Westborough Building Department, and by intentionally misrepresenting his insurance coverage. The Court further found that Lala's acts were knowing or reckless and awarded the Rawans $40,000, plus attorneys' fees. The total judgment, including pre-trial interest, was $710,546, or 700% of the initial settlement offer and 2000% of the final settlement offer. (R.A. Vol. III, p. 325).

On or around June 8, 2015, Continental tendered a check in the amount of $141,435.98, which Continental represented was the remaining policy limits after deduction of $350,564.02 in legal fees incurred in defending the Rawans' claim. (R.A. Vol. III, p. 327).

The Continental Policy

Lala's policy required Continental to defend and hire counsel for any claim against Lala:

> **We have the right and *duty to defend any claim against you*** seeking amounts that are payable under the terms of the Policy, even if any of the allegations of the claim are groundless, false, or fraudulent. ***We will designate, or at our***

> ***option, approve counsel to defend the claim***[.]

(R.A. Vol. III, p. 52 at I(C)). (Emphasis added). Continental was also primarily responsible to handle settlement negotiations, with Lala's cooperation:

> If there is a claim, you must do the following:
>
> ****
>
> (4) ***fully cooperate with us or our designs in the defense of a claim, including but not limited to assisting us in***: the conduct of suits or other proceedings [and] ***settlement negotiations***, and the enforcement of any right of contribution or indemnity against another who may be liable to you. You shall attend hearings and trials and assist in securing evidence and obtaining the attendance of witnesses.

(R.A. Vol. III, p. 63). (Emphasis added).

The Policy required Continental and Lala to each obtain the others' consent before agreeing to a settlement. With respect to Lala's consent, the Policy provided, "[Continental] will not settle any claim without the informed consent of [Lala]." (R.A. Vol. III, p. 54).

The Policy did not include a tie-breaking mechanism to resolve disputes if the parties disagreed on settlement, nor did it require that a decision to

withhold consent be "reasonable", nor did it contain a "hammer clause". (R.A. Vol. III, p. 51).

Continental previously included a "hammer clause" in its professional liability policies, but later removed that clause and marketed its professional liability policies as having no "hammer clause." (R.A. Vol. IV, p. 174, 177).

SUMMARY OF THE ARGUMENT

This appeal posits an important question: can a Massachusetts insurer contract out of the scope of M.G.L. c. 93A and c. 176D by ceding settlement authority to its insured? Continental markets "no hammer clause" policies to the Massachusetts professional liability market. When an insured refuses to settle, however unreasonably, Continental now asks this Court to excuse it from its statutory obligation under M.G.L. c. 176D, § 3(9)(f) "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." This is a bright line policy question. The answer will define the scope and reach of c.176D for insurers, insureds and third parties that have suffered at the hands of an insured.

The facts are particularly pernicious here because, at the very time that Continental now claims its hands were tied, it was actively attempting to steer the Rawans into a speedy mediation. At the same time, Continental refused to produce the Hager Report, a third-party peer review that clearly and unambiguously found that Lala's structural work failed to meet minimum structural safety standards.

Continental now argues that it didn't have sufficient information to settle the Rawans' claim. But that begs the question. If Continental had enough information to mediate, then it had everything it needed to bring that mediation to a final conclusion. If it didn't, then Continental was under a legal duty per c. 176D § 3(9)(d) to conduct the necessary investigation in a timely fashion. But Continental didn't do that. Instead, it waited over a year before engaging another engineer to review the Rawans' damage claim, and even then, that engineer was instructed by counsel appointed by Continental to ignore critical portions of the Hager Report when estimating damages. That expert then issued a repair estimate that was one-tenth that of the Rawan estimate based on a single

telephone call with an out-of-state estimator who never inspected the Rawans' property.

Finally, this case presents a separate, albeit related, violation of c. 176D, § 3(9)(a) because Continental misrepresented the amount of available coverage under Lala's policy at the very time that Continental was actively attempting to steer the Rawans into a speedy mediation.

When asked to produce the policies and declarations pages in discovery, Continental claimed the coverage documents were irrelevant. Only after being ordered by the Superior Court, did Continental disclose Lala's true coverage limits. This set of facts was never addressed in the lower court's summary judgment opinion. But it should have been addressed, both as a standalone violation of c. 176D, and in conjunction with Continental's §§ 3(9)(f) and 3(9)(d) violations.

ARGUMENT

This is an appeal from an order finding no genuine issues of material fact under Mass. R. Civ. P. 56, finding that, "Continental cannot be found liable for violating c. 176D, and by extension, c. 93A, because it engaged in all the settlement practices which its

insured, Lala, authorized." Ruling on Parties' Cross-Motions for Summary Judgment, p. 8. (R.A. Vol. XI, p. 275). For the reasons set forth in Section I below, Continental should not be permitted to contract out of c. 176D, and in any event, Lala did not control or direct the separate c. 176D violations complained of in Sections II–IV.

I. The "no hammer" consent to settle clause in Continental's insurance policy violates M.G.L. c. 176D, § 3(9)(f).

Chapter 176D was enacted "to encourage settlement of insurance claims and discourage insurers from forcing claimants into unnecessary litigation to obtain relief" once liability is reasonably clear. *Hopkins v. Liberty Mut. Ins. Co.*, 434 Mass. 556, 567-58, 750 N.E.2d 943, 948 (2001). Towards that end, the statute spells out various specific acts or omissions that, if committed by an insurer doing business in this Commonwealth, constitute "unfair claim settlement practices." M.G.L. c. 176D, § 3(9). One such "unfair claim settlement practice" is "[f]ailing to effectuate prompt, fair and equitable settlements of claims in

which liability has become reasonably clear[.]" M.G.L. c. 176D, § 3(9)(f).[2]

Section 3(9)(f) is meant to deal with conduct that stymies those with *bona fide* claims from obtaining fair settlements in a reasonably prompt time. *Hopkins*, 434 Mass. 556, 562, 750 N.E.2d 943, 948 (2001); *Clegg* v. *Butler*, 424 Mass. 413, 419, (1997) (176D "enacted to encourage the settlement of insurance claims … and ***discourage insurers from forcing claimants into unnecessary litigation to obtain relief***." (Emphasis added).

In stark contrast to the legislature's mandate that insurers engage in settlement practices that "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," the insurance policy that Continental sold to

[2] Continental's corollary obligations under c. 176D are discussed in Sections II–IV below. Irrespective of whether "no hammer clause" policies insulate insurers from the scope of Sec. 3(9)(f), the combination of Continental's failure to investigate the cost of necessary Rawan repairs, at the same time that Continental was trying to steer the Rawans into a speedy mediation, at the same time that Continental was trying to improperly shelter the Hager report, at the same time that Continental was misrepresenting Lala's insurance coverage, individually and collectively violate Continental's duties under c. 176D.

Lala contained the following consent-to-settle clause: "*We will not settle any claim without the informed consent of the first Named Insured*." In effect, Continental ceded settlement authority in this case to Lala, who unreasonably withheld consent to settle, forcing the Rawans were to engage in prolonged and expensive litigation. This is exactly what M.G.L. c. 176D, § 3(9)(f) was designed to prevent. See *Clegg*, 424 Mass. at 419.

The trial court's ruling, that "Continental cannot be found liable for violating c. 176D, and, by extension, c. 93A, because it engaged in all the settlement practices which its insured, Lala, authorized" and that "Continental could not settle the Rawans' claim without the consent of Lala," highlights how unfair the consent-to-settle clause in Continental's policy truly is.[3] By ceding all settlement authority, Continental now claims to have

[3] The trial court did not rule on the issue of whether the consent-to-settle language in Continental's policy violates Massachusetts law and policy. Instead, the trial court ruled that the consent-to-settle language of the policy insulated Continental from liability because Continental only engaged in those settlement practices that were expressly authorized by Lala.

contracted out of its settlement obligations under 176D.

Continental should not be allowed to build its own escape clause into its policies. *See Downey, et al. v Chutehall Construction Co.* 2015 WL 9597901, *3 (Mass. App. Ct. Jan. 6, 2016) ("[a] statutory right or remedy ... may not be disclaimed if the waiver could do violence to the public policy underlying the legislative enactment."), quoting *Canal Elec. Co. v. Westinghouse Electric Corp.*, 406 Mass. 369, 377-78, 548 N.E.2d 182 (1990), *Spence v. Reeder*, 382 Mass. 398, 413 (1981).

While Lala's policy, like all professional liability policies, may give Lala *a voice* in the settlement discussion, it should not create a vehicle for defeating the law and public policy expressed in c. 176D. Moreover, Continental could have included a hammer clause, a mandatory arbitration clause, or another tie-breaking process to address just this type of settlement disagreement with its insured.

Although a Massachusetts Court has not directly decided whether a consent-to-settle clause can insulate an insurer from its 176D obligations, the Supreme Judicial Court has flagged the issue for

future review. In *Van Dyke v. St Paul Fire & Marine Ins. Co.*, 388 Mass. 671 (1983), an insurer argued precisely this issue: that it had no right to settle the underlying professional negligence claim under a consent-to-settle clause where its insured refused to consent. The Court viewed the argument with skepticism, noting "[i]t may be that an insurer may not rely conclusively on such policy language in the face of obligations expressed in G.L. c. 93A, § 2, and G.L. c. 176D, § 3(9)," but ultimately decided the case on other grounds.

Courts in other jurisdictions have recognized that a consent-to-settle clause should not operate to insulate an insurer from its statutory duty to resolve claims in promptly and in good faith. *See Insurance Co. of North America v. Medical Protective Co.*, 768 F.2d 315 (10th Cir. 1985) (discussing obligation for insurer to conduct settlement discussions in good faith regardless whether insurer will consent, stating a "consent to settle clause … is immaterial to the question whether insurer acted in bad faith."); *McCollough v. Minn. Lawyers Mut. Ins.*, 2013 U.S. Dist. LEXIS 30995, 2013 WL 823411 (D.Mont. Mar. 6, 2013) (holding insurer's argument that it was relieved of

responsibility to settle in good faith because of consent-to-settle clause "unpersuasive"); *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519 (Colo. App. 2008) (noting consent to settle clause did not preclude bad faith action, and insurer should have pursued arbitration with insured to settle disagreement).

Lala's Continental policy is easily distinguishable from excess insurance policies or comparable unique policies that trigger different c. 176D responsibilities. The decision in *Mut. Ins. Co. v. Murphy*, 630 F.Supp.2d 158 (D. Mass 2009) involved a unique "hybrid policy" combining a traditional insurance policy (which confers on the insurer the right to settle and defend) and an excess policy (which leaves the duty to settle and defend on the insured). *See* 630 F.Supp.2d at 164. There, the insured retained the duty to hire its own counsel for defense and settlement, while the insurer only had the right to "associate" with the insured in the defense. Because the insurer lacked control over the defense or settlement, its role was deemed akin to that of an excess insurer, which is not subject to 176D. *Id.* at 164.

In contrast to *Murphy,* Continental was intimately involved in Lala's defense from the date of initial claim through trial. Continental hired Lala's counsel, who reported regularly to Continental and presented every strategy decision and settlement offer to Continental for approval. The decision in *Murphy* is entirely inapposite.

II. Continental's Persistent Effort to Hide the Hager Report violated M.G.L. c. 176D, § 3(9)(a) and M.G.L. c. 93A.

The Hager Report commissioned by Continental as a "tiebreaker"[4] was blunt; "I found the same serious design errors as Neal Mitchell and some additional ones as well as overstresses in the repaired beams that Neal did not get involved with. Sorry for the news but I have to say I side with Neal Mitchell's conclusions and concerns for the structural adequacy of this house."[5]

Continental's refusal to produce Hager's report at the very same time that it was attempting to steer

[4] Mitchell had already issued his peer review report. Lala rejected Mitchell's findings, claiming instead that the root cause of the problems at the Rawan's home was poor construction.

[5] Within days of being compelled to produce the Hager report, Continental made its first settlement offer of $100,000.00.

the Rawans into a fast mediation, was entirely antithetical to c. 176D. Unfair settlement practice includes "misrepresenting pertinent facts or insurance policy provisions relating to the coverage at issue." Facts that unequivocally establish an insured's liability are clearly "pertinent. *Hopkins*, 434 Mass. 567-58 (Chapter 176D was enacted "to encourage settlement of insurance claims and discourage insurers from forcing claimants into unnecessary litigation to obtain relief" when liability is reasonably clear. *Van Dyke*, 388 Mass. 671, 675, 448 N.E.2d 357 (1983) (Any person whose rights have been affected by an insurance practice that violates G.L. c. 176D, §3(9) may sue under G.L. c. 93A).

III. Continental's Misrepresentation of Lala's insurance coverage violated M.G.L. c. 176D, § 3(9)(a) and M.G.L. c. 93A as a matter of law.

M.G.L. c. 176D, § 3(9)(a) provides that an "unfair claim settlement practice shall" include "[m]isrepresenting pertinent facts *or insurance policy provisions relating to coverages at issue*[.]" M.G.L. c. 176D, § 3(9)(a) (emphasis added); *Hopkins*, 434 Mass. 556, 564, 750 N.E.2d 943 (2001) (Ordinarily, an insurer will be deemed to have violated Chapter 93A,

§ 2 to the same extent that it is found to have violated Chapter 176D, § 3(9).

Lala gave notice of the Rawan claim to Continental on November 25, 2011. (Donovan Aff., ¶ 2). (R.A. Vol. III, p. 329). Lala's policy limits from January 1, 2004 through December 31, 2011 was always the same: $500,000/$1,000,000. (R.A. Vol. III, p. 249). Lala's policy limits did not decrease to $250,000/$500,000 until January 1, 2012. *Id.*

After the Rawans filed suit in August 2011, and after Continental retained LeClair Ryan in October 2012, LeClair Ryan advised the Rawans' attorney that Lala's policy limit was $250,000.00. (R.A. Vol. III, p. 222-255). Lala's counsel did so during the period that Continental was actively attempting to steer the Rawans into a mediation.

When the Rawans' counsel sought copies of Lala's policies, Lala's counsel refused to produce the policies, claiming they were irrelevant. When the Rawans served interrogatories seeking coverage information, Lala's counsel objected again on relevance grounds.

It was not until after the Rawans' filed a motion to compel (granted on June 5, 2013) that Continental

disclosed that the real policy limit was twice what Continental had represented to the Rawans in 2012 during the period of active settlement discussions. Supplemental Interrogatories June 25, 2013. (R.A. Vol. III, p. 249). (R.A. Vol. III, p. 249). Continental cannot in good faith claim that its representation that the policy limit was only $250,000.00, when it was in possession of *and withholding* the very documents that stated otherwise. Failure to investigate information within a party's exclusive control is not unintentional mistake. It is willful blindness. *Panzarella v. Travelers Ins. Co.*, 2002 Mass. Super. LEXIS 160, at *49 (Apr. 24, 2002) (unintentional mistake where there was a typographical error in the insurer's interrogatories, which listed a $10,000 policy limit instead of a $1,000,000.00 policy limit).

What makes *this* misrepresentation ripe for 176D and 93A damages is that all of this occurred at the time that Continental withholding the Hager Report and steering the Rawans into mediation. Proposing mediation while knowing that the opponent does not have all the information it is entitled to smacks of the bad faith that M.G.L. c. 176D was intended to

avoid. *Forcucci v. United States Fidelity & Guaranty Co.,* 817 F. Supp. 195, 202 (D.Mass. 1993); *Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 344, 631 N.E.2d 75, 77-78 (1994).

IV. Continental's failure to investigate the Rawans' damages claim for almost a year after the Hager report conclusively established liability violated M.G.L. c. 176D, § 3(9)(d).

Chapter 176D separately imposes liability for "[f]ailing to pay claims without conducting a reasonable investigation based on all available evidence." § 3(9)(d). "The insurer has an obligation to conduct a ***prompt and reasonable investigation*** based on all the available evidence." *Anderson v. Nat'l Union Fire Ins. Co.,* 88 Mass. App. Ct. 1117, *4, 42 N.E.3d 211 (2015) (emphasis added), citing *Schwartz v. Travelers Indem. Co.*, 50 Mass. App. Ct. 672, 676, 740 N.E.2d 1039 (2001).

An insurer violates its duty when it fails to ***promptly*** investigate an insurance claim. *See Clegg,* 424 Mass. at 418; *see also Northern Sec. Ins. Co. v. R.H. Realty Trust*, 78 Mass. App. Ct. 691, 692-93, 941 N.E.2d 688 (2011) (unreasonably delaying payment of insured's legal fees for fourteen months justified finding a violation of Chapter 93); *Gore v. Arbella*

Mut. Ins. Co., 77 Mass. App. Ct. 518, 526-30, 932 N.E.2d 837 (2010) (waiting seven months to propose a settlement when liability was clear, and damages at least exceeded policy limits, constituted a c. 176D violation). An insurer also violates this duty when it "intentionally conducts an investigation not based on all available information." *Anderson*, 88 Mass. App. Ct. 1117, *3.

To the extent Continental now claims there was a good faith dispute concerning the extent of the Rawans' damages, it was required to ***promptly*** investigate that issue. It didn't. Instead, Continental denied liability entirely in its response to the Rawans' c. 93A demand, and during the entirety of the underlying action through trial. As of April 2014 (six months after the Rawans sent their c. 93A demand letter and sixteen months after Continental had notice of the underlying claim), Continental still had not taken any steps to investigate, let alone ***promptly*** investigate, the Rawans' damage claim. (SUF ¶ 44). (R.A. Vol. II, pp. 217-18)

Anderson v. Nat'l Union Fire Ins. Co. of Pittsburgh, 88 Mass. App. Ct. 1117, *4 (Dec. 18, 2015) is instructive. There, the Appeals Court affirmed the

Trial Court's holding that the insurer's investigation was not based on all available information. First, and just as with the Hager Report in this case, the insurer suppressed unfavorable statements which constituted the best evidence as to how the accident occurred. *Id.; see also Bohn v. Vt. Mut. Ins., Co.*, 922, F.Supp.2d 138, 149 (D.Mass. 2013) ("...an insurer violated [Chapter 176D] by purposefully and strategically failing to pursue a line of inquiry because it would uncover unfavorable evidence."). Second, the insurer's accident investigation incorporated into their defense strategy a scenario that was misleading and not supported by the evidence. *Id.; see also Sterlin v. Commerce Inc. Co.*, 2009 Mass. Super. LEXIS 17, 25 Mass. L. Rptr. 124 (Mass. Sup. Ct. 2009) (Insurer violated Chapter 176D, in part, by conducting investigation that was "misleading").

Here, Continental first tried to hide the Hager Report, the best evidence available to Continental as to the adequacy of Lala's structural engineering work. Only after the Court compelled the production of Hager's report did Continental make a $100,000 settlement offer in November, 2012. Continental's offer was entirely devoid of any internal analysis of

the actual cost to repair the Rawan residence. *See, e.g., MT "Baltic Commander" Schiffahrtsgesellshaft GmbH & Co. KG v. Mass. Port Auth.*, 918 F.Supp.2d 105, 2013 WL 265983, at *7 (D.Mass. Jan. 24, 2013) ("while [plaintiff's] chapter 93A demand [of $700,00] was unreasonably high, [the insurer's] offer of $10,000 was unreasonably low in light of all the reasonably available objective data"). This is not a reasonable investigation based on all available information.

Lala's renewed settlement offer of $100,000, 14 months after the Rawans sent their c. 93A demand and 23 months after Continental first had notice of the underlying claim, consciously turned a blind eye to the full extent of the Rawans' damages claim. Rather, the offer was based on an artificially narrowed engineering analysis and a single telephone conversation with an out-of-state estimator for which no notes exist. That delay, followed by an intentionally narrowed analysis, smacks of bad faith.

RELIEF REQUESTED

The Rawans ask this Court to find that Continental's reliance on a "no hammer" consent-to-settle clause that lacked any resolution mechanism in the event of an insured's unreasonable refusal to

settle, violated c. 176D, § 3(9)(f) as a matter of law. Alternatively, the Rawan's ask the Court to find that the lower court erred in failing to find on the record below that Continental's "no hammer" policy, in conjunction with Continental's other actions and failures to act, violated c. 176D and c. 93A, and to remand the case with an instruction to reinstate the Rawans' claims and to schedule an assessment of damages hearing at the earliest convenient date. Alternatively, the Rawans ask the Court to reverse the lower court's summary judgment order, and to reinstate all of the Rawans' claims for further proceedings.

Respectfully submitted,

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August 27, 2018

Attorneys for Appellants.

CERTIFICATE OF SERIVCE

I, Daniel J. Lyne, certify under the penalties of perjury that the foregoing document was served upon John G. O'Neill, Jessica H. Park, and Regina E. Roman, counsel to Continental Casualty Co., electronically by operation of the Court's e-filing system on this 27th day of August 2018.

/s/ Daniel J. Lyne
Daniel J. Lyne

CERTIFICATE OF COMPLIANCE

PUSUANT TO RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Daniel J. Lyne, hereby certify that the foregoing brief complies with the rules of the court that pertain to filing of briefs, including, but no limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statues, rules, regulations); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

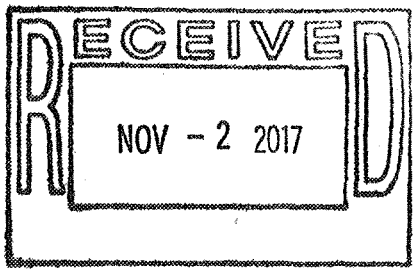
/s/ Daniel J. Lyne
Daniel J. Lyne

CLERK'S NOTICE	DOCKET NUMBER 1185CV01605	Trial Court of Massachusetts The Superior Court
CASE NAME: Douglas M Rawan et al vs. Kanayo Lala PE et al		Dennis P. McManus, Clerk of Courts
TO: Daniel Joseph Lyne, Esq. Murphy & King, Professional Corporation One Beacon St Boston, MA 02108-3107		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608

You are hereby notified that on 10/25/2017 the following entry was made on the above referenced docket:

Endorsement on Motion for Summary Judgment as to Count I of their Second Amended Complaint (#77.0): DENIED See Ruling of Judge Reardon dated 10/25/2017.

Judge: Reardon, Jr., Hon. James G



DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
10/30/2017	Hon. James G Reardon, Jr.	(508)831-2357

Date/Time Printed: 10-30-2017 15:57:29

SCV016_X1\ 08/2014

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 11-01605A

DOUGLAS RAWAN AND KRISTEN RAWAN

vs.

CONTINENTAL CASUALTY COMPANY

RULING ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

Background:

This case involves a question of summary judgment on a Chapter 93A claim against an insurance carrier for allegedly improper settlement practices under Chapter 176D as a result of negligent design and construction of the plaintiffs' residence. For the following reasons, **THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS ALLOWED AND THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IS DENIED.**

This case has been thoroughly briefed and capablly argued by counsel for both parties. A substantial record exists, not solely due to the pleadings in this matter, but also as a result of the trial and verdict in the underlying negligence and Chapter 93A claim against the insured, Kanayo Lala (Lala), a registered professional engineer who designed the plaintiffs' home. (See Douglas and Kristen Rawan v. Kanayo Lala, P.E., Worcester Superior Court, Docket No: 2011 CV 1605A[1]). In that case, tried in September 2014, the jury found that Lala was negligent in his design of the home and awarded the Rawans damages in the amount of $400,000. In an advisory verdict, the jury also found Chapter 93A violations, but did not find them to be willful. The jury

[1] Defendant Continental Casualty was named in this suit, but the claim against it was severed from the trial against Lala.

gave an advisory verdict recommending $20,000 in c. 93A damages. Upon review of the jury's c. 93A findings, the court ruled that Lala's misrepresentations to the Town of Westborough that the home construction was in compliance with building codes and misrepresentations to the plaintiffs regarding his insurance coverage constituted violations of c. 93A. The court accepted the base award of c. 93A damages recommended by the jury, but found that the misrepresentations by Lala were either knowing or reckless and so doubled the award to $40,000.

Prior to the trial, the parties attempted to resolve the claim. The plaintiffs asserted before litigation began and up to the trial that Lala's carrier, Continental Casualty Company (Continental), violated Chapter 176D by failing to properly investigate and settle the claim. Continental asserted that it could not settle because Lala would not consent to settlement. Following the trial verdicts, the plaintiffs, Douglas and Kristen Rawan (Rawans), continue to pursue their c. 93A claim on the remaining count against Continental. Each party asserts it is entitled to summary judgment on this claim.

The dispositive issue upon which the competing motions turn is the meaning and effect of the following language in the policy between Lala and Continental: "We will not settle any claim without the informed consent of the first Named Insured." The Rawans do not dispute the existence and accuracy of this clause or that at times Lala refused to negotiate a possible settlement, but argue that it is void as contrary to the public policy evidenced in c. 176D. Continental argues that this language has never been found to be violative of law or public policy and that it was therefore bound to follow it and refuse to settle when directed to do so by Lala.

Facts[2]:

The record before the court establishes the following facts:

Prior to August 30, 2012, Lala repeatedly refused to invoke coverage under his insurance policy, thereby refusing indemnity payments to the Rawans. Lala first invoked coverage on August 30, 2012, in response to an e-mail from Jack Donovan, a claim consultant at Continental, Lala's professional liability company.

In October 2012, the Rawans demanded $272, 890 in settlement from Lala in their chapter 93A letter. In a letter dated November 28, 2012, Attorney McCraw, Lala's counsel, recommended offering the Rawans $100,000 to settle the case.

Under the terms of Lala's policy, Continental was permitted to settle claims only with the consent of the named insured. Specifically, the policy provided that Continental "will not settle any claim without the informed consent on the first Named Insured." Mr. Donovan spoke with Lala at the time to see whether he would consent to an offer and recommended that they make an offer of $100,000, to be paid from Lala's policy. On November 29, 2012, Lala authorized Mr. Donovan to make the $100,000 offer. Continental thereafter made a $100,000 settlement offer. Attorney McCraw sent a letter to Continental and Lala on January 4, 2013, with a status report that the Rawans no longer wished to settle and intended to take the matter to trial. Shortly thereafter, Lala spoke to Attorney McCraw and stated that he was withdrawing his authorization for any settlement offers to be made to the Rawans. Lala also informed Attorney McCraw that he would not give his authority to settle again. In an email to Attorney McGraw the following day, May 3, 2013, Lala stated that:

I see the way of [the] Rawans for the extortion very clear here.

[2] The recitation of the facts is limited to those details relevant to the settlement negotiations between the parties as outlined in the pleadings filed in the cross-motions for summary judgment. The resolution of the underlying trial against Lala is not relevant to this decision.

All the issues (basically four beams) were settled with their consulting engineer Mr. Mitchell and the rectification done and paid by me and accepted by Mr. Rawan in writing and also approved by the town building commissioner.

All other issues are the poor workmanship of their subcontractors and that can be argued in the court or in front of a[n] arbitrator. I do not see any need to agree to pay a penny to Mr. Rawan based on any of such documents which are developed to fix their workmanship.

After receiving the Rawans' formal demand of May 6, 2013 for the amount of $1,324,390, Attorney McGraw informed Lala of the demand over the telephone. Lala told Attorney McCraw at that time that he had no interest in making a settlement offer in response to the Rawans' demand.

On May 6, 2013, Mr. Hedstrom, Continental's claim consultant, wrote to Lala to provide him with clarification of the coverage under his Policy. In his letter, Mr. Hedstrom informed Lala that, among other things, he had received a copy of the Rawans' December 3, 2010 e-mail to Lala, that the e-mail met the Policy's definition of a claim, and that the appropriate policy period for the matter was therefore 1/1/2010-1/1/2011. Mr. Hedstrom's letter informed Lala that Continental would be providing coverage for the Rawans' claim under that policy term, which provided a limit of liability of $500,000 for each claim and $1,000,000 in the aggregate for all claims made during the policy year, and that the limit applied to both the claim and claim expenses, such as attorneys' fees. Mr. Hedstrom also noted that the Rawans were claiming damages in excess of $1,000,000, and that in the event of an excess judgment, any amount in excess of the remaining policy limits would be Lala's responsibility.

Despite the policy's higher limit, Lala intended to proceed to trial without making any further settlement offers to the Rawans.

In August 2013, an engineer expert Lisa Davey estimated repairs costs at $100,000 to 120,000. In an email dated October 25, 2013, Attorney McCraw stated the following:

Finally, the insured, Mr. Lala himself, has stated numerous times that he will not pay the Rawans anything more than what he feels is the reasonable cost to fix the "one or two" areas that may need additional support—a figure Mr. Lala places in the range of $10,000-$15,000. This is consistent with his steadfast "no pay" position on the other cases were have had with Mr. Lala. . .

Given the deep-seated personal animus between Mr. Lala, the Rawans, and Mr. Mitchell, Mr. Lala is virtually certain not to consent to settle this case . . . . even if an agreeable figure could be reached. (We offered $100,000 to settle in November 2012. Mr. Lala begrudginely consented at the time, but withdrew that consent when the Rawans rejected that offer, and stated that he would not give it again.)

Accordingly, Attorney McCraw expressed that while they could potentially make an offer in the range of Ms. Davey's estimate, it would serve little purpose, as "[t]he Rawans are certain to reject it, and Mr. Lala is equally certain not to consent to settle the case for that amount in any event."

On November 25, 2013, Mr. Hedstrom e-mailed Lala regarding the possibility of settlement. In his e-mail, Mr. Hedstrom stated that, though the offer they had made the year before of $100,000 had been rejected, "I think we should consider whether to restate that offer based on the analysis of Ms. Davey where she places a cost of repairs between $100,000 and $120,000 and her opportunity to explain this during her deposition."

Lala, who was in India at the time, received Mr. Hedstrom's e-mail and responded later that day. In his response, Lala stated that he agreed with Mr. Hedstrom, and though he noted his view that "there is nothing expensive," he authorized Mr. Hedstrom to settle for $100,000.

On December 2, 2013, the $100,000 offer was extended to the Rawans. The Rawans rejected the offer two days later without a counteroffer. In a January 7, 2014 report, Attorney McCraw noted that Lala had "expressed strong conviction that the Rawans deserve nothing in settlement, not at trial."

In late March 2014, the trial date was postponed. Mr. Hedstrom learned of this on March 20, 2014, and he e-mailed Lala that day to inform him of that fact. In his e-mail, Mr. Hedstrom also stated that he wanted to revisit settlement with Lala. In particular, Hedstrom wrote that:

> I wanted to explore with you . . . whether or not you would consider further offers to see if we can get Mr. Rawan to reconsider his demand. With the trial date being pushed off into the future, perhaps there may be some willingness on his part to try and bring this matter to a conclusion. Therefore, I am taking this opportunity to ask you if you would be willing to consent to efforts to try and settle this matter for an amount in excess of the $100,000 and if so, is there an amount that you would set as a cap to any future negotiation?

Lala replied to Mr. Hestrom's e-mail the same day, stating that he would prefer to go to court and try their best to win on those elements that were not deficient, though he asked to hear Attorney McCraw's opinion as well.

On April 1, 2014, Lala e-mailed Attorney McCraw, stating that he wanted to keep going with trial preparation, and that no new offers were to be initiated from his side. Attorney McCraw forwarded Lala's e-mail to Mr. Hedstrom the same day, noting that Lala would authorize no further offers on the case.

On July 11, 2014, as trial approached, Attorney McCraw wrote to Mr. Hedstrom and Lala again. In his letter, Attorney McCraw reiterated, among other things, the possibility that a jury would award the Rawans damages in excess of the remaining policy limits, exposing Lala's personal assets. Attorney McCraw again asked Lala to reconsider the issue of settlement:

> [A]s trial is now scheduled to begin in 10 days, we revisit the issue from our exchange of e-mails on March 31 and April 1, in which you stated, "No new offers from my side to be initiated." Under the circumstances, we will not know whether the Rawans would accept a higher offer, even one as high as the remaining limits on your insurance policy. Please confirm that your position remains unchanged, and that you will not authorize any additional offers of settlement."

Lala was not willing to initiate a settlement offer at that time and did not provide authorization to do so, instead preferring to proceed to trial.

In a September 19, 2014 letter to Lala and Mr. Hedstrom, Attorney McCraw sought to revisit "the potential for settlement in an effort to avoid possible exposure of Kanayo's personal assets in the event of a verdict exceeding the remaining policy limits[.]" The letter asked Lala to "please let us know if you agree with our again stated recommendation that we re-engage the Rawans in settlement discussions, to determine if a settlement within the limits of the remaining available insurance coverage will be achieved." Though Lala was aware of the risk of an excess verdict if they proceeded to trial, he declined to authorize any further settlement explorations with the Rawans at that time.

In September/October 2014, the case proceeded to jury trial. Jury awarded the Rawans $400,000 on the negligence count and $20,000 on the c. 93A claim.

Discussion:

Summary judgment is granted where there are no issues of material fact and when the moving party is entitled to judgment as a matter of law. Mass. R. Civ.P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue, and that the moving party is entitled to a judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). A party moving for summary judgment, not bearing the burden of proof at trial, may demonstrate the absence of a triable issue by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). A moving party can meet its burden by showing the non-moving party lacks evidence to support the non-moving party's case. See *Kourouvacilis*, 410 Mass. at 711. Once the moving party meets that burden, the non-moving

party must show by admissible evidence that there does exist a dispute as to material facts. *Id.* A non-moving party plaintiff must set forth specific facts showing the existence of an issue for trial. *Id.*

The responsibility for construing the language of an insurance contract is a question of law for the trial judge. *Ruggerio Ambulance Serv., Inc., v. National Grange Mut. Ins. Co.*, 430 Mass. App. Ct. 794, 797 (2000). Here, the language at issue, "We will not settle any **claim** without the informed consent of the first **Named Insured**"[3] is susceptible of only one interpretation: Continental could not settle the Rawans' claim without the consent of Lala. Continental, despite various attempts to convince Lala to settle this claim, was never able to gain his permission to offer more than $100,000. Both times that this offer was made, the Rawans rejected it. The record is clear that Continental appropriately counseled Lala that the claim against him had substantial merit and that he was in jeopardy of being found liable on a judgment in excess of the policy limits. Lala nevertheless steadfastly refused to increase the $100,000 offer and declined to engage in further negotiations. Under these circumstances, Continental's hands were tied, and it was legally precluded from making other efforts to settle the case.

Accordingly, Continental cannot be found liable for violating c. 176D, and, by extension, c. 93A, because it engaged in all the settlement practices which its insured, Lala, authorized. Any argument that Continental should have done more to convince Lala to settle would be inappropriate as it would be based upon conjecture, speculation, and surmise. The Rawans have cited no decision or regulation which sets a standard for settlement discussions between an insurer and its insured, and the court is disinclined to rule what any such standard should be or to

[3] Joint Exhibit Index, No: 4, pg.2, Section 1 (E)

hold that plaintiffs have a right to make a claim based upon an alleged deficiency of communications between an insurer and its insured.

The Rawans assert that the language of the policy precluding settlement without Lala's consent violates the principles and spirit of c. 176D, § 3(9), and cite to *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 676 n.6 (1983). That case dealt with a similar clause in a professional liability policy issued to physicians. The policy had been issued prior to the 1979 amendment to § 3. The court stated: "It may be that an insurer may not rely conclusively on such policy language in the face of obligations expressed in G. L. c. 93A, § 2, and G. L. c. 176D, § 3 (9). *See Transit Casualty Co. v. Spink Corp.*, 94 Cal. App. 3d 124, 135-136 (1979)." *Id.* However, since 1983, the year of the *Van Dyke* decision, no Massachusetts court has held that such policy language violates Chapter 176D or Chapter 93A. In *Mutual Ins. Co. v. Murphy*, 630 F. Supp. 2d 158, 170 (D. Mass. 2009), a more recent decision, the court, in construing a similar provision, held that where the right to control settlement rests with the insured and the insured withholds permission, the insurer cannot be held liable under c. 93A or c. 176D.

It remains the law that "[a] plausible, reasoned legal position that may ultimately turn out to be mistaken -- or simply, as here, unsuccessful -- is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D." *Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339, 343 (1994. As this prerequisite to settlement is a valid requirement of the contract between Lala and Continental, Continental cannot be held liable under either c. 176D or c. 93A for relying on it in refusing to engage in additional settlement negotiations. See *Manganella v. Evanston Ins. Co.*, 700 F.3d 585, 595 (1st Cir. 2012); *Evans v. Mayer Tree Service, Inc.*, 89 Mass. App. Ct. 137, 152 (2016); *Pacific Indemnity Company v. Lampo*, 86 Mass. App. Ct. 60, 67 (2014).

Accordingly, Defendant, Continental Casualty Company's Motion For Summary Judgment is **ALLOWED** and the motion of Plaintiffs Douglas Rawan and Kristen Rawan is **DENIED.**

J. Gavin Reardon, Jr.
Justice of the Superior Court

DATE: October 25, 2017

CLERK'S NOTICE	DOCKET NUMBER 1185CV01605	Trial Court of Massachusetts The Superior Court

CASE NAME:
Douglas M Rawan et al vs. Kanayo Lala PE et al

Dennis P. McManus, Clerk of Courts

TO:
Daniel Joseph Lyne, Esq.
Murphy & King, Professional Corporation
One Beacon St
Boston, MA 02108-3107

COURT NAME & ADDRESS
Worcester County Superior Court
225 Main Street
Worcester, MA 01608

You are hereby notified that on 11/20/2017 the following entry was made on the above referenced docket:

SEE ATTACHED AMENDED SUMMARY JUDGMENT

NOV 22 2017

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
11/20/2017	**Hon. James G Reardon, Jr.**	**(508)831-2357**

AMENDED SUMMARY JUDGMENT
MASS. R. CIV. P. 56

Trial Court of Massachusetts
The Superior Court

Dennis P. McManus, Clerk of Courts

DOCKET NUMBER
1185CV01605

CASE NAME
Douglas M Rawan et al
vs.
Kanayo Lala PE et al

COURT NAME & ADDRESS
Worcester County Superior Court
225 Main Street
Worcester, MA 01608

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Continental Casualty Company

NOV 22 2017

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Rawan, Douglas M
Rawan, Kristen A

This action came before the Court, Hon. James G Reardon, Jr., presiding, upon Motion for Summary Judgment of the defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

That the judgment entered 11/03/2017 is VACATED and the following judgment shall enter:
Judgment is hereby entered for the defendant Continental Casualty Co. as to any and all claims, including, but not limited to, G. L.c. 93A and c. 176D claims brought by the plaintiffs Doulgas M. Rawan and Kristen A. Rawan against defendant Continental Casualty Co.

DATE JUDGMENT ENTERED
11/20/2017

CLERK OF COURTS/ ASST. CLERK
X Joanne C Herring
(Joanne C Herring)

Date/Time Printed: 11-20-2017 11:19:24

SCV061: 03/2016

CLERK'S NOTICE	DOCKET NUMBER 1185CV01605	Trial Court of Massachusetts The Superior Court

CASE NAME:
Rawan, Douglas M et al vs. Lala PE, Kanayo et al

Dennis P. McManus, Clerk of Courts

TO:
Daniel Joseph Lyne, Esq.
Murphy & King, Professional Corporation
One Beacon Street
Boston, MA 02108

COURT NAME & ADDRESS
Worcester County Superior Court
225 Main Street
Worcester, MA 01608

You are hereby notified that on 04/22/2016 the following entry was made on the above referenced docket:

ORDER: FINDINGS OF FACT AND IMPOUNDMENT ORDER;
The Court Orders that Exhibits 139 and 140 be Impounded indefinitely. In accordance with this Order, Plaintiff should submit to the clerk the full joint exhibit index with the original exhibits 139 and 140 to be impounded, so that the material may be available to the court.

(see attached)
Copies mailed 04/22/2016

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
04/22/2016	Hon. Janet Kenton-Walker	(508)831-2357

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-01605-A

DOUGLAS M. RAWAN and
KRISTEN A. RAWAN,

Plaintiffs,

v.

CONTINENTAL CASUALTY CO.

Defendant.

FINDINGS OF FACT AND IMPOUNDMENT ORDER

79

This case is before the Court on Plaintiffs' Assented to Motion to Impound Exhibits 139 and 140 to the Joint Exhibit Index. Plaintiffs offer the Exhibits in support of their Opposition to Defendant's Cross-Motion For Summary Judgment. After notice and hearing, for good cause shown, and after no opposition received, the Court grants the Motion and makes the following findings:

1. The Court has considered the relevant factors pursuant to Trial Court Rule VIII (Uniform Rules On Impoundment Procedure), including the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reasons for the request for impoundment.
2. The factors weigh in favor of impoundment. There is no evidence of community interest. The information contains private medical information about Plaintiffs Douglas and Kristen Rawan.

3. There is no significant public interest in having access to the Rawans' private medical information, such that the First Amendment or the common law right of access to the Court's records would forbid impoundment.

Therefore, the Court orders that Exhibits 139 and 140 be impounded indefinitely. In accordance with this Order, Plaintiffs should submit to the Clerk the full Joint Exhibit Index with the original Exhibits 139 and 140 to be impounded, so that the material may be available to the Court.

Justice of the Superior Court

Dated: 4/21, 2016

Part I ADMINISTRATION OF THE GOVERNMENT

Title XV REGULATION OF TRADE

Chapter 93A REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Section 2 UNFAIR PRACTICES; LEGISLATIVE INTENT; RULES AND REGULATIONS

Section 2. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and

decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XV REGULATION OF TRADE

Chapter 93A REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION

Section 9 CIVIL ACTIONS AND REMEDIES; CLASS ACTION; DEMAND FOR RELIEF; DAMAGES; COSTS; EXHAUSTING ADMINISTRATIVE REMEDIES

Section 9. (1) Any person, other than a person entitled to bring action under section eleven of this chapter, who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the

court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons; the court shall require that notice of such action be given to unnamed petitioners in the most effective practicable manner. Such action shall not be dismissed, settled or compromised without the approval of the court, and notice of any proposed dismissal, settlement or compromise shall be given to all members of the class of petitioners in such manner as the court directs.

(3) At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. For the purposes of this chapter, the amount of actual damages to be multiplied by the court

shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence or nonexistence of insurance coverage available in payment of the claim. In addition, the court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper. The demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section. Notwithstanding any other provision to the contrary, if the court finds any method, act or practice unlawful with regard to any security or any contract of sale of a commodity for future delivery as defined in section two, and if the court finds for the petitioner, recovery shall be in the amount of actual damages.

(3A) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, attorneys' fees and costs, as herein provided. The demand requirements and provision for tender of offer of settlement provided in paragraph (3) shall also be applicable under this paragraph, except that no rights to equitable relief shall be created under this paragraph, nor shall a person asserting a claim hereunder be able to assert any claim on behalf of other similarly injured and situated persons as provided in paragraph (2).

(4) If the court finds in any action commenced hereunder that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty days of the mailing or delivery of the written demand for relief required by this section.

[There is no paragraph (5).]

(6) Any person entitled to bring an action under this section shall not be required to initiate, pursue or exhaust any remedy established by any regulation, administrative procedure, local, state or federal law or statute or the common law in order to bring an action under this section or to obtain injunctive relief or recover damages or attorney's fees or costs or other relief as provided in this section. Failure to exhaust administrative remedies shall not be a defense to any proceeding under this section, except as provided in paragraph seven.

(7) The court may upon motion by the respondent before the time for answering and after a hearing suspend proceedings brought under this section to permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings to complainants if the respondent's evidence indicates that:

(a) there is a substantial likelihood that final action by the court favorable to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme that regulates or covers the actions or transactions complained of by the petitioner established and administered under law by any state or federal regulatory board or officer acting under statutory authority of the commonwealth or of the United States; or

(b) that said regulatory board or officer has a substantial interest in reviewing said transactions or actions prior to judicial action under this chapter and that the said regulatory board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any, which the petitioner represents, under this section.

Upon suspending proceedings under this section the court may enter any interlocutory or temporary orders it deems necessary and proper pending final action by the regulatory board or officer and trial, if any, in the court, including issuance of injunctions, certification of a class, and orders concerning the presentation of the matter to the regulatory board or officer. The court shall issue appropriate interlocutory orders, decrees and injunctions to preserve the status quo between the parties pending final action by the regulatory board or officer and trial and shall stay all proceedings in any court or before any regulatory board or officer in which petitioner and respondent are necessarily involved. The court may issue further orders, injunctions or other relief while the matter is before the regulatory board or officer and shall terminate the suspension and bring the matter forward for trial if it finds (a) that proceedings before the regulatory board or officer are unreasonably delayed or otherwise unreasonably prejudicial to the interests of a party

before the court, or (b) that the regulatory board or officer has not taken final action within six months of the beginning of the order suspending proceedings under this chapter.

(8) Except as provided in section ten, recovering or failing to recover an award of damages or other relief in any administrative or judicial proceeding, except proceedings authorized by this section, by any person entitled to bring an action under this section, shall not constitute a bar to, or limitation upon relief authorized by this section.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 176D UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE

Section 3 UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES

Section 3. The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:?

(1) Misrepresentations and false advertising of insurance policies: making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement which:?

(a) Misrepresents the benefits, advantages, conditions, or terms of any insurance policy;

(b) Misrepresents the dividends or shares of the surplus to be received on any insurance policy;

(c) Makes any false or misleading statements as to the dividends or share or surplus previously paid on any insurance policy;

(d) Misleads or misrepresents the financial condition of any person or the legal reserve system upon which any life insurer operates;

(e) Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(f) Misrepresents for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy;

(g) Misrepresents for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(h) Misrepresents any insurance policy as being shares of stock.

(2) False information and advertising generally: making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation: making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

(4) Boycott, coercion and intimidation: (a) entering into an agreement to commit, or by concerted action committing, an act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance; (b) an refusal by a nonprofit hospital service corporation, medical service corporation, insurance or health maintenance organization to negotiate, contract or affiliate with a health care facility or provider because of such facility's or provider's contracts, type of provider licensure or affiliations with any other nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization; or (c) an nonprofit hospital service corporation, medical service corporation, insurance company or health maintenance organization establishing the price to be paid to any health care facility or provider by reference to the price paid, or the average of prices paid, to such facility or provider under a contract or contracts with any other nonprofit hospital service corporation, medical service corporation, insurance company, health maintenance organization or preferred provider arrangement.

(5) False statements and entries: (a) knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person; or (b) knowingly making any false entry of a material fact in any book, report or statement of any person or

knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) Stock operations and advisory board contracts: issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

(7) Unfair discrimination: (a) making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract; or (b) making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) Rebates: Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any insurance contract, including but not limited to a contract for life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity any rebate of

premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract, or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

Nothing in clauses (7) or (8) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:?(i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders; (ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payment directly to an office of the insurer in the amount which fairly represents the saving in collection expenses; (iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experienced thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(9) Unfair claim settlement practices: An unfair claim settlement practice shall consist of any of the following acts or omissions:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) Failing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) Making known to insured or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements of compromises less than the amount awarded in arbitration;

(l) Delaying the investigation or payment of claims by requiring that an insured or claimant, or the physician of either, submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage; or

(n) Failing to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(10) Failure to maintain complaint handling procedures; failure of any person to maintain a complete record of all of the complaints which it has received since the date of its last examination, which record shall indicate in such form and detail as the commissioner may from time to time prescribe, the total number of complaints, their classification by line of insurance, and the nature, disposition, and time of processing of each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance. Agents, brokers and adjusters shall maintain any written communications received by them which express a grievance for a

period of two years from receipt, with a record of their disposition, which shall be available for examination by the commissioner at any time.

(11) Misrepresentation in insurance applications: making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money, or other benefit from any insurers, agent, broker, or individual.

(12) A violation of section 2B, 95, 113X, 181 to 183, inclusive, 187B to 187D, inclusive, 189, 193E or 193K of chapter 175.

Part III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

Title II ACTIONS AND PROCEEDINGS THEREIN

Chapter 233 WITNESSES AND EVIDENCE

Section 23C WORK PRODUCT OF MEDIATOR CONFIDENTIAL; CONFIDENTIAL COMMUNICATIONS; EXCEPTION; MEDIATOR DEFINED

Section 23C. All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least

thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) §14260) and Illinois (Ill.Rev.Stat. (1937) ch. 110, §§181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

Note to Subdivision (d). See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco* (N.D.Cal. 1944) 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc*. (C.C.A.2d, 1939) 107 F.(2d) 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself serves a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp*. (1944) 321 U.S. 620. See also Commentary, *Summary Judgment as to Damages* (1944) 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co*. (C.C.A.2d, 1945) 147 F.(2d) 399, cert. den. (1945) 325 U.S. 861. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a

proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (d). Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co*. (C.C.A.7th, 1942) 130 F. (2d) 535; *Biggins v. Oltmer Iron Works* (C.C.A.7th, 1946) 154 F.(2d) 214; 3 *Moore's Federal Practice* (1938). 3190–3192. Since interlocutory appeals are not allowed, except where specifically provided by statute (see 3 *Moore, op. cit. supra*, 3155–3156) this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co., supra*. See also *Audi Vision Inc., v. RCA Mfg. Co*. (C.C.A.2d, 1943) 136 F.(2d) 621; *Toomey v. Toomey* (App.D.C. 1945) 149 F.(2d) 19; *Biggins v. Oltmer Iron Works, supra; Catlin v. United States* (1945) 324 U.S. 229.

NOTES OF ADVISORY COMMITTEE ON RULES—1963 AMENDMENT

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice and Procedure* 159 –60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc. v. Recordgraph Corp*., 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc*., 191 F.Supp. 383 (D.Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co*., 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F.Supp. 542 (E.D.Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, §1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 56 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 56(a) and (b) referred to summary-judgment motions on or against a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment. The list was incomplete. Rule 56 applies to third-party claimants, intervenors, claimants in interpleader, and others. Amended Rule 56(a) and (b) carry forward the present meaning by referring to a party claiming relief and a party against whom relief is sought.

Former Rule 56(c), (d), and (e) stated circumstances in which summary judgment "shall be rendered," the court "shall if practicable" ascertain facts existing without substantial controversy, and "if appropriate, shall" enter summary judgment. In each place "shall" is changed to "should." It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 –257 (1948). Many lower court decisions are gathered in 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, §2728. "Should" in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine

issue as to any material fact. Similarly sparing exercise of this discretion is appropriate under Rule 56(e)(2). Rule 56(d)(1), on the other hand, reflects the more open-ended discretion to decide whether it is practicable to determine what material facts are not genuinely at issue.

Former Rule 56(d) used a variety of different phrases to express the Rule 56(c) standard for summary judgment—that there is no genuine issue as to any material fact. Amended Rule 56(d) adopts terms directly parallel to Rule 56(c).

COMMITTEE NOTES ON RULES—2009 AMENDMENT

The timing provisions for summary judgment are outmoded. They are consolidated and substantially revised in new subdivision (c)(1). The new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action. If the motion seems premature both subdivision (c)(1) and Rule 6(b) allow the court to extend the time to respond. The rule does set a presumptive deadline at 30 days after the close of all discovery.

The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule. Scheduling orders are likely to supersede the rule provisions in most cases, deferring summary-judgment motions until a stated time or establishing different deadlines. Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules. A scheduling order may be adjusted to adopt the parties' agreement on timing, or may require that discovery and motions occur in stages—including separation of expert-witness discovery from other discovery.

Local rules may prove useful when local docket conditions or practices are incompatible with the general Rule 56 timing provisions.

If a motion for summary judgment is filed before a responsive pleading is due from a party affected by the motion, the time for responding to the motion is 21 days after the responsive pleading is due.

COMMITTEE NOTES ON RULES—2010 AMENDMENT

Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.

Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination. As explained below, "shall" also is restored to the place it held from 1938 to 2007.

The first sentence is added to make clear at the beginning that summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense. The subdivision caption adopts the common phrase "partial summary judgment" to describe disposition of less than the whole action, whether or not the order grants all the relief requested by the motion.

"Shall" is restored to express the direction to grant summary judgment. The word "shall" in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace "shall" with "should" as part of the Style Project, acting under a convention that prohibited any use of "shall." Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — "must" or "should" — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948))," with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Eliminating "shall" created an unacceptable risk of changing the summary-judgment standard. Restoring "shall" avoids the unintended consequences of any other word.

Subdivision (a) also adds a new direction that the court should state on the record the reasons for granting or denying the motion. Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.

The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Subdivision (b). The timing provisions in former subdivisions (a) and (c) are superseded. Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case.

Subdivision (c). Subdivision (c) is new. It establishes a common procedure for several aspects of summary-judgment motions synthesized from similar elements developed in the cases or found in many local rules.

Subdivision (c)(1) addresses the ways to support an assertion that a fact can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support

be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Subdivision (c)(1)(A) describes the familiar record materials commonly relied upon and requires that the movant cite the particular parts of the materials that support its fact positions. Materials that are not yet in the record — including materials referred to in an affidavit or declaration — must be placed in the record. Once materials are in the record, the court may, by order in the case, direct that the materials be gathered in an appendix, a party may voluntarily submit an appendix, or the parties may submit a joint appendix. The appendix procedure also may be established by local rule. Pointing to a specific location in an appendix satisfies the citation requirement. So too it may be convenient to direct that a party assist the court in locating materials buried in a voluminous record.

Subdivision (c)(1)(B) recognizes that a party need not always point to specific record materials. One party, without citing any other materials, may respond or reply that materials cited to dispute or support a fact do not establish the absence or presence of a genuine dispute. And a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact.

Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated. There is no need to make a separate motion to strike. If the case goes to trial, failure to challenge admissibility at the summary-judgment stage does not forfeit the right to challenge admissibility at trial.

Subdivision (c)(3) reflects judicial opinions and local rules provisions stating that the court may decide a motion for summary judgment without undertaking an independent search of the record. Nonetheless, the rule also recognizes that a court may consider record materials not called to its attention by the parties.

Subdivision (c)(4) carries forward some of the provisions of former subdivision (e)(1). Other provisions are relocated or omitted. The requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration is omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record.

A formal affidavit is no longer required. 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under penalty of perjury to substitute for an affidavit.

Subdivision (d). Subdivision (d) carries forward without substantial change the provisions of former subdivision (f).

A party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion.

Subdivision (e). Subdivision (e) addresses questions that arise when a party fails to support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c). As explained below, summary judgment cannot be granted by default even if there is a complete failure to respond to the motion, much less when an attempted response fails to comply with Rule 56(c) requirements. Nor should it be denied by default even if the movant completely fails to reply to a nonmovant's response. Before deciding on other possible action, subdivision (e)(1) recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step.

Subdivision (e)(2) authorizes the court to consider a fact as undisputed for purposes of the motion when response or reply requirements are not satisfied. This approach reflects the "deemed admitted" provisions in many local rules. The fact is considered undisputed only for purposes of the motion; if summary judgment is denied, a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. And the court may choose not to consider the fact as undisputed, particularly if the court knows of record materials that show grounds for genuine dispute.

Subdivision (e)(3) recognizes that the court may grant summary judgment only if the motion and supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them.

Subdivision (e)(4) recognizes that still other orders may be appropriate. The choice among possible orders should be designed to encourage proper presentation of the record. Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed. And the court may seek to reassure itself by some examination of the record before granting summary judgment against a pro se litigant.

Subdivision (f). Subdivision (f) brings into Rule 56 text a number of related procedures that have grown up in practice. After giving notice and a reasonable time to respond the court may grant summary judgment for the nonmoving party; grant a motion on legal or factual grounds not raised by the parties; or consider summary judgment on its own. In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c).

Subdivision (g). Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after the court has applied the summary-judgment standard carried forward in subdivision (a) to each claim, defense, or part of a claim or defense, identified by the motion. Once that duty is discharged, the court may decide whether to apply the summary-judgment standard to dispose of a material fact that is not genuinely in dispute. The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel

confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

If it is readily apparent that the court cannot grant all the relief requested by the motion, it may properly decide that the cost of determining whether some potential fact disputes may be eliminated by summary disposition is greater than the cost of resolving those disputes by other means, including trial. Even if the court believes that a fact is not genuinely in dispute it may refrain from ordering that the fact be treated as established. The court may conclude that it is better to leave open for trial facts and issues that may be better illuminated by the trial of related facts that must be tried in any event.

Subdivision (h). Subdivision (h) carries forward former subdivision (g) with three changes. Sanctions are made discretionary, not mandatory, reflecting the experience that courts seldom invoke the independent Rule 56 authority to impose sanctions. *See* Cecil & Cort, Federal Judicial Center Memorandum on Federal Rule of Civil Procedure 56 (g) Motions for Sanctions (April 2, 2007). In addition, the rule text is expanded to recognize the need to provide notice and a reasonable time to respond. Finally, authority to impose other appropriate sanctions also is recognized.

Changes Made After Publication and Comment

Subdivision (a): "[S]hould grant" was changed to "shall grant."

"[T]he movant shows that" was added.

Language about identifying the claim or defense was moved up from subdivision (c)(1) as published.

Subdivision (b): The specifications of times to respond and to reply were deleted.

Words referring to an order "in the case" were deleted.

Subdivision (c): The detailed "point-counterpoint" provisions published as subdivision (c)(1) and (2) were deleted.

The requirement that the court give notice before granting summary judgment on the basis of record materials not cited by the parties was deleted.

The provision that a party may accept or dispute a fact for purposes of the motion only was deleted.

Subdivision (e): The language was revised to reflect elimination of the point-counterpoint procedure from subdivision (c). The new language reaches failure to properly support an assertion of fact in a motion.

Subdivision (f): The provision requiring notice before denying summary judgment on grounds not raised by a party was deleted.

Subdivision (h): Recognition of the authority to impose other appropriate sanctions was added.

Other changes: Many style changes were made to express more clearly the intended meaning of the published proposal.

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‹ Rule 55. Default; Default Judgment up Rule 57. Declaratory Judgment ›