

## Mass. SJC Upholds Bad Faith Award Against Insurer Despite Payment of Loss in Full

Insurers may revisit a previous denial of a claim for many reasons. The facts may have turned out differently than expected, the law may have changed, or the cost of defense may warrant a compromise offer. Or, a claims professional may realize that an earlier decision to deny a claim was erroneous.

Many lawyers and claims professionals believe that a full settlement that provides a claimant with complete recovery of her damages will eliminate the potential for a bad faith claim because a claimant who has recovered all of her damages would have no loss upon which to base the bad faith action. The Massachusetts Supreme Judicial Court recently rejected any notion that there can be no bad faith claim without an uncompensated loss.

In so ruling, the Court in **Auto Flat Car Crushers, Inc. v. Hanover Insurance Company**, 469 Mass. 813, 17 N.E.3d 1066 (October 15, 2014), clarified what constitutes the requisite "loss" for recovery under the Massachusetts Consumer Protection Act, and held that neither the existence of an uncompensated loss nor the entry of a judgment is a prerequisite to recovery under the statute, M.G.L. c. 93A.

### Background

The plaintiff, Auto Flat Car Crushers, Inc. (Auto Flat) operated a vehicle crushing service and had been insured under a garage insurance policy issued by the defendant, Hanover Insurance Company (Hanover). In connection with a project at a salvage yard

involving removal of fuel tanks, in March 2004, Auto Flat was notified by the Department of Environmental Protection (DEP) that a release of hazardous material had occurred at the salvage yard, and that Auto Flat was a "party with potential liability" under the pertinent statute. The DEP ordered Auto Flat to take various responsive actions.

Auto Flat advised Hanover of the notice and requested defense and indemnification. In June 2004, Hanover denied coverage based on several policy terms and exclusions. Auto Flat renewed its request in November 2004, and Hanover again responded with a denial of coverage, referring to additional exclusions. After the DEP matter concluded and Auto Flat had incurred legal expenses and remediation costs, Auto Flat contacted Hanover in August 2008 and asserted that Hanover improperly denied defense and indemnity. Hanover reaffirmed its denial. Auto Flat then commenced suit in superior court.

Auto Flat's complaint asserted four counts: (1) seeking a declaration that Hanover had a duty to defend Auto Flat against the DEP's allegations; (2) alleging breach of contract for Hanover's failure to defend; (3) seeking a declaration that Hanover had a duty to indemnify Auto Flat for costs incurred by Auto Flat in complying with the DEP's directives; and (4) alleging breach of contract for Hanover's failure to indemnify. Hanover counterclaimed, seeking declarations that it did not owe Auto Flat defense or indemnity.

Several entries of summary judgment

followed. In December 2009, Auto Flat's motion for partial summary judgment on count one was allowed, the court ruling that the policy provided coverage for defense against the DEP's allegations. Thereafter, in March 2010, Auto Flat amended its complaint to add a fifth count, alleging Hanover's denial of a defense constituted a violation of c. 93A, § 11. In May 2010, six years after the initial claim for coverage, Hanover agreed to reimburse Auto Flat for its expenses for legal fees in the DEP and coverage actions as well as its cleanup and remediation costs, plus interests. Auto Flat accepted reimbursement, without prejudice to its rights to pursue additional amounts owed or damages under c. 93A.

Hanover thereafter successfully moved for partial summary judgment on the breach of contract counts on the grounds that by accepting reimbursement of its expenses, Auto Flat could not demonstrate it continued to suffer damages, and therefore, its breach of contract claims failed as a matter of law.

Hanover then sought summary judgment on the c. 93A count, asserting that its reimbursement of Auto Flat's expenses precluded a finding of "loss of money or property," as required under c. 93A, § 11. The judge denied that motion, finding that Auto Flat had suffered monetary loss "as a matter of historical fact." The matter was appealed and transferred to the Supreme Judicial Court (SJC) on its own motion.

The dispute presented to the SJC was whether Auto Flat had a viable claim

under G.L. c. 93A following its acceptance of reimbursement payments from Hanover. That is, the issue on appeal was whether the existence of uncompensated loss or the entry of a judgment, neither of which is present, is a prerequisite to recovery under the statute.

To succeed on a claim under c. 93A, § 11, a plaintiff must establish (1) that the defendant committed an unfair or deceptive act or practice as contemplated by c. 93A, § 2; (2) a resulting loss of money or property; and (3) a causal connection between the loss and the unfair or deceptive act.

Hanover argued that its reimbursement of Auto Flat's expenses eliminated all of Auto Flat's actual damages, and, therefore, Auto Flat would not be able to establish loss of money or property, a necessary showing for recovery under c. 93A, § 11. Auto Flat countered that it continued to have viable claims for breach of contract and violation of c. 93A

because Hanover's refusal to provide it with a defense in the DEP matter constituted an unfair or deceptive act within the scope of c. 93A, and that its actual damages were those incurred as a matter of historical fact, regardless of whether those damages were no longer outstanding, and regardless of whether those damages had been established by a judgment. Thus, the issue was whether Auto Flat, after accepting Hanover's payment which had fully reimbursed Auto Flat's losses in connection with the breach of the duty to defend, could prove it suffered actual damages.

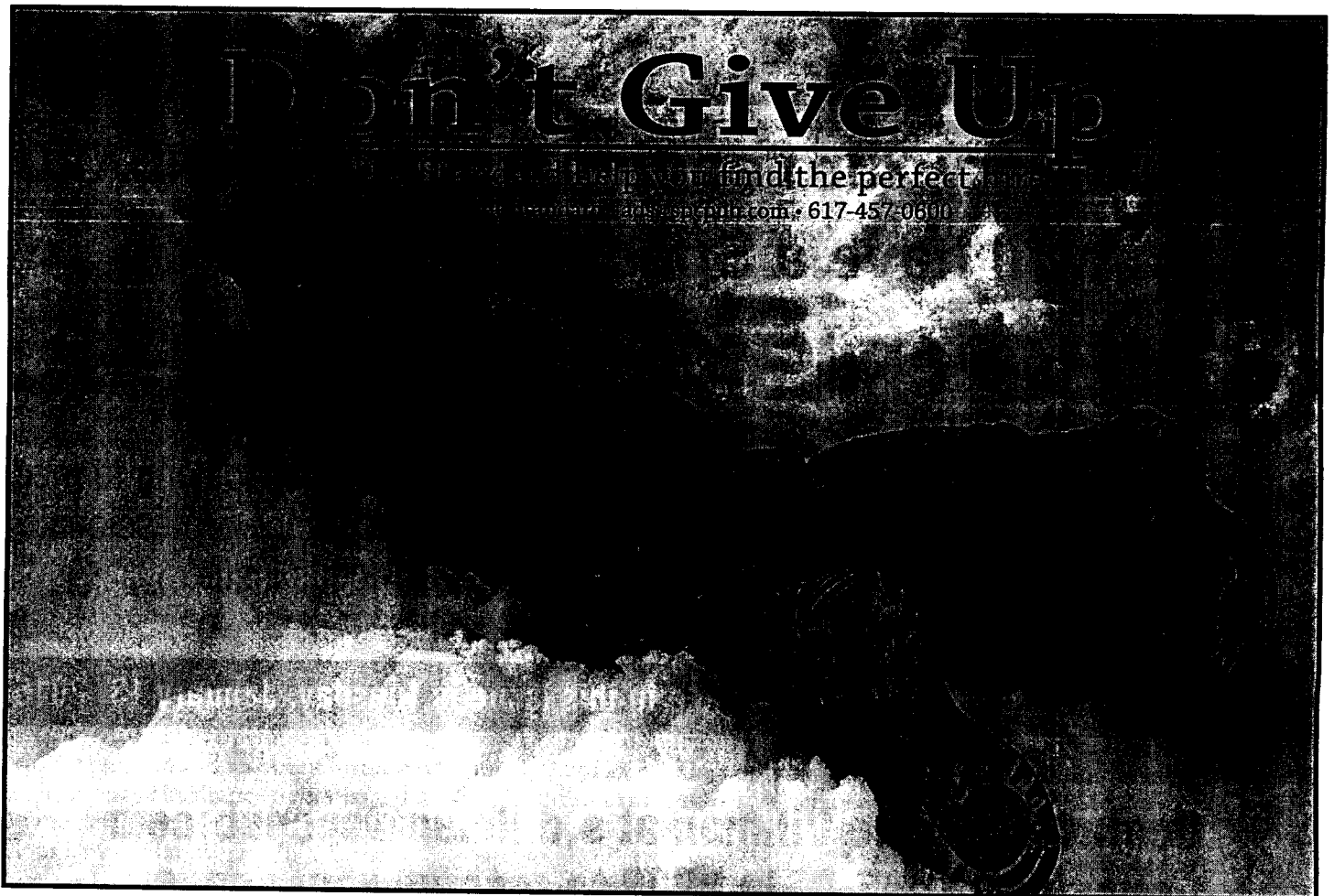
### No Requirement of an Uncompensated Loss

The Court held that a plaintiff suffers actual loss where it can establish it sustained concrete monetary or property loss, without requiring a showing that the loss remains uncompensated. The Court noted that recovery under c. 93A is not limited by traditional tort or contract principles.

Therefore, although acceptance of a tender of payment may affect the viability of a contract claim, it would not foreclose a claim under c. 93A unless such a claim had been expressly settled.

Section 11 of c. 93A provides that the damages to which a prevailing plaintiff is entitled are the monetary or property losses suffered, or up to three times that amount where a defendant commits a willful or knowing violation of the statute. Thus, the statute provides redress where a person sustains a loss of money or property caused by another's invasion of his legally protected interest. Section 11 does not impose a requirement that the loss be outstanding or uncompensated. Any prior compensation is treated as an offset against any damages ultimately awarded, rather than serving as a bar to recovery.

The Court engaged in an examination of the legislative purpose behind the statute. The Court noted that



§ 11 is intended to deter misconduct while providing a remedy for specific harm as a result of such misconduct. Barring claims where the loss has been compensated would undermine that purpose.

Hanover argued that the payments to Auto Flat were essentially a settlement under § 11, and therefore, allowing Auto Flat's c. 93A claim to proceed would undercut the statutory purpose of promoting settlement. In response, the Court highlighted that the statute contains a provision to promote settlement and prevent needless

litigation. Under § 11, a defendant may tender a written offer of settlement with its answer and thereby limit its liability to single damages. Hanover had not taken that step.

The Court further noted that under Hanover's interpretation, "insurers would be free to engage in dilatory conduct, arguably in violation of c. 93A, with the knowledge that, so long as they ultimately reimbursed claimants for their resulting expenses, statutory liability could be avoided." This would contravene the purpose of the statutory scheme.

Therefore, the Court held, Auto Flat could continue to maintain its claim under c. 93A, § 11, notwithstanding its acceptance of compensatory payments for its damages.

### Prior Judgment Is Not a Prerequisite to Recovery

The Court then considered the issue of whether c. 93A requires a prior judgment establishing damages as a prerequisite to recovery. The statute provides that recovery thereunder shall be in the amount of actual damages, or two to three times that amount if the unfair act or practice was a willful and knowing violation of the statute. Moreover, the statute provides, "the amount of actual damages to be multiplied ... shall be the amount of the judgment on all claims arising out of the same underlying transaction..." Hanover argued that recovery of damages under the statute was triggered by a judgment, and no judgment having entered, Auto Flat could recover only loss of use damages, i.e., interest, which had previously been reimbursed.

The Court rejected Hanover's argument and held that the statute did not make a prior judgment a prerequisite to recovery. Instead, the above-quoted language provides that in certain circumstances, a judgment may be an appropriate basis from which to calculate multiple damages. The Court relied on legislative history, noting that an amendment adding the quoted language was intended to increase potential penalties and expand the base from which multiple damages could be awarded. However, "the general rule ... is that single recovery shall be the amount of actual damages, meaning the (foreseeable) loss to the claimant caused by the violation, this amount to be doubled or tripled where the violation was in bad faith." The quoted statutory language simply sets forth an exception to this general rule, applicable where a plaintiff has recovered a judgment. In that circumstance, the entire judgment forms the basis for multiplication, even if the judgment represents more than the amount of damages attributable to the violation of c. 93A. Where

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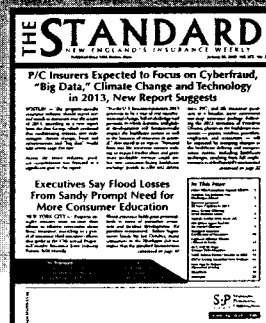
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no judgment has been entered, for example, in the case of a settlement, the provision for multiplying the judgment simply has no applicability.

Therefore, the Court concluded, the absence of a judgment does not preclude recovery under c. 93A, but rather, recovery in such circumstance is the amount of actual damages, that is, "all foreseeable and consequen-

tial damages arising out of conduct which violates the statute," subject to multiplication in the appropriate circumstances. In absence of a judgment, the recoverable damages depend on the nature of the statutory violation. Where the statutory violation is an unreasonable delay in settling a claim under an insurance policy, the plaintiff's actual damages are generally the interest lost on the wrongfully

withheld funds. Where the violation is a breach of the duty to defend, the damages may include out-of-pocket expenses incurred by the plaintiff in addition to interest.

Auto Flat could therefore maintain its c. 93A claim despite the absence of a judgment establishing the amount of its contractual damages. Any eventual award of damages will be reduced

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by the amount Hanover has already paid to Auto Flat, the offset to be applied after multiplying, if warranted, the actual damages.

### Implications of the Case

It is now clear that a plaintiff need not prove an uncompensated loss nor the entry of judgment as a prerequisite to recovery under c. 93A. Thus, tender of payment for past expenses will not foreclose a claim for recovery under the statute. However, as the Court noted, claims under c. 93A can be expressly addressed in the terms of any such tender. Therefore, where an insurer makes a payment for claims of alleged breach of contract for failure to defend and indemnify, the terms of any agreement surrounding such payment should specifically address any c. 93A claims.

Moreover, as the Court highlighted, c. 93A, § 11 contains a provision whereby a defendant can limit its potential liability under the statute to single damages. Under § 11, a defendant may tender a written offer of settlement for single damages. If the plaintiff rejects the offer and the court finds the tender was reasonable in relation to the actual injury sustained, the court will not award more than single damages. Thus, when an insurer answers a claim, it may wish to consider extending an offer to settle for single damages and thereby limit its potential exposure to single damages. ■

## calendar

### MAIW Cape Cod Chapter to Meet January 13

The Cape Cod Chapter of the Massachusetts Association of Insurance Women will hold its next meeting on January 13 from 5:30 p.m. – 8:00 p.m. at the Torino Restaurant & Bar at 415 Main Street, Hyannis. The cost is \$35 per person.

Sponsored by the Northwood Insurance Agency, the event will focus on fellowship and networking. Each member is encouraged to bring a non-member. In addition to dinner, there will be a wine tasting, raffles and a drawing for a \$50 gift card.

RSVP to Martha Findlay either by fax at (508) 775-3821 or email at marthaf@occia.com. Mail payments to the attention of Martha Findlay at Old Cape Cod Insurance Agency, 296 Winter Street, Hyannis, MA 02601.

### MAIW Plymouth Chapter to Meet January 13

The Plymouth Chapter of the Massachusetts Association of Insurance Women will hold its monthly dinner meeting on January 14 at 5:15 p.m. at Ernie's Restaurant on 330 Court Street, Plymouth. After the networking session and business meeting, instructor Lynn Rothenhausler will teach a class on mitigation awareness

and response, worth 2 continuing education credits.

Attendees are asked to bring an unwrapped holiday gift or holiday item as part of a raffle to benefit the Home for Little Wanderers in Plymouth. Donations of children's winter items such as hats, mittens and school supplies are especially welcome.

RSVP to Monique Duquette at [Mduquette@rogersgray.com](mailto:Mduquette@rogersgray.com) or (877) 816-2156 by Monday, January 12.

### Maine CPCU Society to Hold Installation of Officers Ceremony

The Maine Chapter of the CPCU Society will hold its installation of officers and present the USM Risk Management Scholarship Award on January 22 at 4:30 p.m. at Dimillo's on the Water, 25 Long Wharf, Portland. The following officers will be installed: George MacKinnon, incoming president; Eric Swanson, president-elect; Claudette Deschenes, vice president; Stephanie Abbott Davis, treasurer and Matt Cote, secretary.

The cost is \$30 per person. Checks are payable to Maine CPCU Society Chapter. RSVP by January 12 to Claudette Deschenes at [cdeschenes@oaksdesktopsolutions.com](mailto:cdeschenes@oaksdesktopsolutions.com) or mail a check to her attention at 7 Fieldstone Estates, Newmarket, N.H. 03857.

Commonwealth of Massachusetts  
Division of Insurance

January 9, 2015

**PRIME PROPERTY & CASUALTY  
INSURANCE, INC.**  
8722 S. Harrison Street  
Sandy, UT 84070

The above company has made application to the Division of Insurance to obtain a Foreign Company License to transact Property and Casualty insurance in the Commonwealth.

Any person having any information regarding the company which relates to its suitability for the license or authority the applicant has requested is asked to notify the Division by personal letter to the Commissioner of Insurance, 1000 Washington Street, Suite 810, Boston, MA, 02118-6200, Attn: Financial Surveillance and Company Licensing within 14 days of the date of this notice.

Commonwealth of Massachusetts  
Division of Insurance

January 9, 2015

**THE CHARTER OAK FIRE  
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One Tower Square  
Hartford, CT 06183

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Commonwealth of Massachusetts  
Division of Insurance

January 9, 2015

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INSURANCE COMPANY**  
One Tower Square  
Hartford, CT 06183

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