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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1584CV01482-BLS1

LIBERTY MUTUAL INSRUANCE CO.[1]

vs.

MANSOUR CONSTRUCTION, INC. & others[2]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER FOR JUDGMENT

The present insurance dispute arises from the January 14, 2015, construction site death of Steven Reis ("Reis"), who was struck and killed by a falling load of sheetrock. Reis was an employee of subcontractor Mansour Construction, Inc. ("Mansour"). On May 18, 2015, Reis's Estate (the "Estate") brought a wrongful death lawsuit (the "Reis wrongful death lawsuit") against East Coast Building Materials ("East Coast"), the company that delivered the sheetrock. On June 18, 2015, the Estate filed an amended complaint adding as a defendant the East Coast employee that delivered the sheetrock, Edward Cassady. On August 26, 2015, East Coast and Cassady filed a third-party complaint against the general contractor, Suffolk Construction Company ("Suffolk"), and another subcontractor, Liberty Construction Services, LLC ("LCS"). On March 31, 2016, the Estate filed a second amended complaint asserting direct claims against Suffolk and LCS. While the Estate did not sue Mansour directly,[3] on October 27, 2016, Suffolk filed a third-party complaint against Mansour alleging that Mansour had breached its obligation

[1] As assignee and subrogee of Suffolk Construction Company, Inc., and subrogee of Liberty Construction Services, LLC.

[2] Travelers Indemnity Company and St. Paul Fire and Marine Insurance Company.

[3] Mansour was not subject to a direct suit from the Estate in light of the workers compensation statute's prohibition against an employee suing over injuries covered by the statute.

under its subcontract with Suffolk to defend and indemnify Suffolk for the Estate's claims ("Coverage Claims").

After two days of mediation in late 2017, the Estate settled its wrongful death claims against Suffolk, LCS, East Coast, and Cassady for $12,000,000. Mansour, through its insurers, participated in the mediation but did not contribute to the final settlement. Following the settlement, Liberty Mutual Insurance Company ("Liberty Mutual"), as Suffolk's insurer, was substituted for Suffolk as the third-party plaintiff on Suffolk's remaining Coverage Claims against Mansour. Liberty Mutual thereafter filed an amended third-party complaint, retaining the Coverage Claims, and adding new G.L. c. 93A claims against Mansour's insurers, Traveler's Indemnity Company and St. Paul Fire and Marine Insurance Company, for their alleged failure to offer a reasonable settlement during the mediation in violation of G.L. c. 176D ("Unfair Settlement Practices Claims").

In October 2022, the Coverage Claims were tried before a Suffolk County jury (the "Coverage Trial"), which returned a verdict for Mansour on all claims, finding that Mansour had not breached its duty to defend or indemnify Suffolk as to the Coverage Claims.

In September 2023, the case then came before this court for a bench trial on the Unfair Settlement Practices Claims. The court heard the testimony of Tim Katsigianis, Paul Kayata, Attorney Kenna Plangemann, Attorney Paul Kelleher, Greg Winsor, Attorney William J. Dailey, III, David Ives, Michelle Digman, and Attorney Michael Johnson. Exhibits were introduced, including portions of the depositions of Sherri Rose, Russell Steininger, Lynn Conley, and Milena Ivanis.

Based upon the credible evidence and reasonable inferences drawn therefrom, I make the following findings of fact (reserving some facts for later discussion) and conclusions of law.

FINDINGS OF FACT

1. The Parties and the Policies

In 2014, Suffolk was hired to be the General Contractor on a renovation project of the Boys and Girls Club in South Boston (the "Project"). Suffolk retained Mansour and LCS as subcontractors on the Project. East Coast and Cassady became involved through the delivery of the sheetrock to LCS.

Suffolk and LCS each had a general liability insurance policy with $2,000,000 liability limits and umbrella policies with $10,000,000 liability limits, all issued by Liberty Mutual. Mansour had a $1,000,000 primary policy issued by Travelers Indemnity Company, and a $10,000,000 excess policy issued by St. Paul Fire and Marine Insurance Company (collectively the "Travelers Policies") (hereinafter Travelers and St. Paul, as insurers for Mansour, are collectively referred to as "Travelers").[4] Mansour's Travelers Policies covered claims related to Mansour's subcontract with Suffolk.[5]

2. The Suffolk Subcontracts

The subcontract between Suffolk and Mansour placed sole responsibility for the safety of Mansour employees on Mansour.[6] It also required Mansour to defend and indemnify Suffolk "from and against any claims . . . caused by, arising out of, resulting from, or occurring in

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[4] Travelers and St. Paul's merged in 2004.

[5] Under a separate policy, Travelers also insured East Coast and Cassady.

[6] The relevant provision provides in full:

> **8.17.2 Safety**. Provision of a safe and healthy work site for Subcontractor's employees (including the provision of all required training and/or appropriate personal protective equipment) is Subcontractor's sole responsibility. The Subcontractor shall comply with all provisions of the regulations adopted thereunder, the State's Right to Know Law, OSHA regulations and Contractor's safety program (as applicable), all safety requirements of Owner, Contractor, Owner's or Contractor's insurance carriers, all applicable laws, ordinances, regulations, rules and orders of the locality in which the Work is done and shall defend, indemnify and hold the Contractor and Owner harmless from any and all fines, penalties, claims, damages, or losses resulting in a violation of the provisions of this Paragraph. The Subcontractor agrees to insert this clause in each of its sub-subcontracts and enforce the same. (Ex. 44).

connection with (i) Work, whether or not caused in part by the negligence or other fault of a party indemnified hereunder; (ii) any breach or default by the Subcontractor in the performance of any of its obligations under the Subcontract . . . ." However, under the subcontract, Mansour had no duty to defend or indemnity Suffolk if Mansour, itself, was not a cause of the accident.[7]

LCS also had a subcontract with Suffolk which included a similar indemnification provision.

3. The Accident

On January 14, 2015, Reis was struck and killed by a load of sheetrock that fell off the end of a suspended boom operated by Cassady. On July 7, 2015, OSHA cited Mansour, stating that it "did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to a struck-by and crushing hazard." (Ex. 3). OSHA fined Mansour $7,000 and instructed it to train employees working at the jobsite of the hazards of suspended loads and to not allow employees to engage in any activities below any suspended loads.

[7] The relevant provision provides in full:

> **8.8 Indemnification.** To the fullest extent permitted by law, Subcontractor shall defend, indemnify and save harmless Contractor, Contractor's sureties and Owner, as well as any other parties which Contractor is required under the Contract Documents to defend, indemnify and hold harmless, and their agents, servants and employees, from and against any claims, costs, expenses, damages, suits, and/or liability (including attorneys' fees and costs and attorneys' fees incurred in enforcing Subcontractor's obligations set forth in this Section 8.8), caused by, arising out of, resulting from, or occurring in connection with (i) the Work, whether or not caused in part by the negligence or other fault of a party indemnified hereunder, (ii) any breach or default by the Subcontractor in the performance of any of its obligations under the Subcontract, or (iii) any actions or suits concerning any of the foregoing in which any of the indemnitees are made a party defendant; provided, however, Subcontractor's duties set forth in this Section 8.8 shall not arise if any such claim, cost, expense, damage, suit, and/or liability is wholly caused by the sole negligence of a party indemnified hereunder. . . . (Ex. 44).

4. Suffolk's Claim for Indemnification

On January 16, 2015, Katsigianis, a major case specialist at Travelers, was assigned to handle the case as it related to Mansour.[8] He completed a preliminary investigation, and reviewed the subcontract and the various polices. On February 26, 2015, Kayata, a Senior Technical Claims Specialist at Liberty Mutual, sent a tender letter on behalf of Suffolk to Mansour seeking defense and indemnification in connection with the Reis wrongful death lawsuit. (Ex. 22). Travelers's claims notes relating to Reis's death reflect internal discussions about Travelers's potential liability. (Ex. 2). The notes show that Travelers was anticipating the possibility that Mansour would have to indemnify Suffolk for half of its liability. For example, on March 17, 2015, Katsigianis noted: "The goal is to resolve this between the three contractors/insurance companies involved. We have Travelers for [East Coast] the delivery truck; Travelers for Mansour who will probably owe AI and DI to Suffolk; and Liberty Mutual for [LCS] another sub to Suffolk who we will more than likely share the AI/DI. So we have three carriers to probably contribute toward a global settlement in the near future." The notes reflect Travelers's desire to resolve the case going back to 2015.

Liberty Mutual assigned Kayata to handle the claims against Suffolk. Kayata sent several emails to Katsigianis between May 7, 2015, and February 10, 2016, inquiring about the status of Liberty Mutual's tender. Katsigianis responded twice during that time that he was reviewing the documentation.

Travelers's claims notes reflect that it recognized from the beginning that pursuant to Mansour's subcontract with Suffolk, it might be liable for half of any amount paid by Suffolk to the Estate. Initially, Travelers set its reserve at $500,000 for the claim. In early 2016, it

[8] The companion case involving East Coast's policy was handled by a different claims adjuster at Travelers, consistent with Travelers's policies and procedures.

increased the reserve to $750,000, and then to $917,000. The increase to $917,000 was based on a total estimated exposure range of between $3,000,000 and $5,500,000, split equally between Suffolk, LCS, and East Coast, and the belief that Mansour might owe half of Suffolk's share. The notes and various email correspondence show that throughout, Katsigianis applied this formula to estimate Mansour's potential exposure. Each time the estimate of the Estate's total claim went up, Travelers's estimate of its potential liability on behalf of Mansour went correspondingly up.

On February 16, 2016, Attorney David R. Cain, representing Suffolk on behalf of Liberty Mutual, sent a demand letter to Attorney Andrew D. McNaught, representing Mansour on behalf of Travelers, seeking contractual defense and indemnification from Mansour in connection with the Reis wrongful death lawsuit. (Ex. 18). Attorney McNaught responded on March 25, 2016, rejecting Suffolk's tender. (Ex. 20). He noted that there were no facts alleged in the Reis wrongful death lawsuit that suggested that "either Mansour or Reis did or failed to do anything which caused the accident." Attorney McNaught further noted that: 1) LCS also had an indemnification provision in its subcontract with Suffolk; 2) in contrast with Mansour, LCS was a named defendant in the Reis wrongful death lawsuit; and 3) LCS had for that reason accepted tender of Suffolk's defense. Attorney McNaught acknowledged that if Mansour or Reis were found to have been a cause of the accident, Mansour would be required to contribute, along with LCS, to indemnify Suffolk's share of any judgment and reimburse one-half of Suffolk's defense costs.

In October 2016, the Estate filed a fourth amended complaint adding counts for gross negligence and punitive damages against Suffolk. Travelers took the position that it would not

be responsible for paying punitive damages. Accordingly, Travelers's reserve on behalf of Mansour was not increased to reflect any potential liability for punitive damages.

Travelers's claims notes reflect that in September 2017, Katsigianis was estimating that if the settlement value was $6,000,000, Suffolk, LCS and East Coast would each owe $2,000,000, with Mansour owing one half of Suffolk's share or $1,000,000.

On March 23, 2017, Liberty Mutual informed Suffolk by letter that its punitive damages exposures were not insurable under Massachusetts law, and that it reserved its rights as to any payment for punitive damages. (Ex. 41). On October 25, 2017, Attorney Edwin Doernberger, on behalf of Suffolk, wrote a letter to Liberty Mutual's attorney, John Love, asking Liberty Mutual to remove its reservation of rights as to the punitive damages claims, and argued that Massachusetts law did in fact allow for coverage for punitive damages. (Ex. 46). Attorney Love responded on November 13, 2017, refuting Attorney Doernberger's arguments, and stating that Liberty Mutual intended to maintain its reservation of rights regarding the punitive damages claims. (Ex. 47).

5. Settlement

Between April 29, 2016, and February 17, 2017, Liberty Mutual made several increasing settlement offers to the Estate for $1,250,000, $1,500,000, and $1,750,000, on behalf of Suffolk and LCS.

On August 25, 2017, Attorney William J. Dailey, III, representing Suffolk, wrote a letter to Kayata (Liberty Mutual's claims adjuster) assessing the value of the claims. (Ex. 36). In that letter, based on his assessment of the facts and comparable verdicts/settlement, Attorney Dailey opined that a reasonable settlement would be in the range of $7,000,000 to $9,000,000.

Similarly, on August 8, 2017, Attorney Cain wrote a memo to Liberty Mutual stating that excluding punitive damages, he believed that a fair settlement value on the case was $6,000,000, but for a variety of reasons he thought the total settlement number would be at least $7,500,000 "and perhaps in the 8 figure range." (Ex. 58). He further stated: "Plaintiffs will push the punitive issue; while I think we will win on that at trial it will nonetheless be a significant part of the discussion at mediation." (Ex. 58).

On September 8, 2017, Attorney Paul Tighe, representing Liberty Mutual, sent a letter to the Estate's attorney, Paul Kelleher, in which he argued that based on the discovery that had been conducted to date, the liability of LCS and Suffolk were not reasonably clear. (Ex. 66).

Two weeks later, on September 20, 2017, Kayata noted in Liberty Mutual's claim notes that "liability remains contested among the defendants and damages are not clear . . . ." (Ex. 56).

On October 27, 2017, a mediation was held (the "First Mediation"). Prior to the First Mediation, Katsigianis assessed the wrongful death action as presenting a reasonable settlement range of $4,500,000 to $6,000,000, with Mansour's exposure between $750,000 and $1,000,000. Accordingly, Katsigianis sought and received a $1,000,000 settlement authority.

Attorney Plangemann, in-house counsel for Suffolk, attended the First Mediation on behalf of Suffolk. She credibly testified that it was her view at the time that LCS had greater responsibility for the accident than Suffolk since its job was to manage the site and sequence the delivery of sheetrock. She was shocked, then, that the Estate's presentation made no mention of LCS or Mansour. Rather, the Estate focused its attention on Suffolk. This fact, along with Reis's wife's emotional state and the Estate's compelling presentation, changed the way Attorney Plangemann valued the case insofar as she did not think it would settle without contribution from Suffolk.

At the end of the First Mediation, the joint settlement offer was $7,500,000 — $4,000,000 of which was offered by Liberty Mutual for Suffolk and LCS, and $3,500,000 of which was offered by Travelers on behalf of East Coast and Cassady. The Estate's demand was $19,000,000. The mediator told the parties that he believed it would take $12,000,000 to $13,000,000 to settle the case. Because the case did not settle at the First Mediation, a second mediation was scheduled for December 1, 2017 (the "Second Mediation").

Attorney Plangemann testified that following the First Mediation, Suffolk agreed that it would need to contribute more money towards the settlement. She did not remember whether the risk of punitive damages was discussed.[9]

Katsigianis believed that any contribution by Travelers on behalf of Mansour above $1,000,000 would represent a contribution towards punitive damages, and he did not believe Mansour was obligated to pay punitive damages even if they were found to have a duty to indemnify Suffolk. Nevertheless, since he is not a lawyer, and was concerned that he might be wrong about Mansour's obligation regarding punitive damages, Katsigianis increased Mansour's reserve to $2,500,000[10] and attended the Second Mediation with settlement authority of up to $2,000,000.

At the beginning of the Second Mediation, Katsigianis made a $1,000,000 settlement offer to Liberty Mutual and Suffolk on behalf of Mansour. Katsigianis testified that he did not make that offer contingent on a release from Suffolk. He did not hear anything back regarding

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[9] Attorney Plangemann's testimony, that it never entered her mind that there was punitive damages exposure, was not credible. This issue clearly was a concern that inevitably had an impact on the ultimate settlement of the case. Moreover, Attorney Plangemann testified that she "ghost wrote" the October 25, 2017, letter from Attorney Doernberger to Liberty Mutual's attorney John Love, in which Suffolk argued that Liberty Mutual should remove its reservation of rights as to the Estate's punitive damages claims because punitive damages were insurable under Massachusetts law. (Ex. 46).

[10] Katsigianis testified that of the $2,500,000 in reserve, $2,000,000 was for indemnity and the rest was to cover defense costs.

the offer until he was told that Suffolk was going to settle the case on its own and "deal with Travelers later." Katsigianis was never given the opportunity to increase his settlement offer on behalf of Mansour or otherwise participate in the settlement. He understood at all times that he had to try to settle the case if liability was reasonably clear.

The Reis wrongful death lawsuit was settled at the Second Mediation for $12,000,000, with Liberty Mutual agreeing to contribute $7,500,000 for Suffolk and LCS, and Travelers agreeing to contribute $4,500,000 on behalf of East Coast and Cassady. A memorandum of understanding was signed at the end of the day (the "MOU"). (Ex. 34). The MOU stated: "The Parties to the above entitled action hereby agree to settle this matter for Twelve Million ($12,000,000)* Dollars and to execute all necessary documents in order to conclude all claims. Settlement amount of $12,000,000 to be reduced to agreement for judgment to be filed in court to conclude cases; a portion of settlement may be structured." (Emphasis in original). The following notes appeared below the signatures of the parties:

> *$7.5 million Suffolk Construction/Liberty Construction
> $4.5 million East Coast/Edward Cassady
>
> The settlement amount relates to the compensatory claims. The Agreement for judgment will relate to the negligence claims against the defendants. All other claims will be dismissed with prejudice by the Plaintiff.
>
> This settlement relates to Plaintiff's claims against the defendants.

A settlement agreement consistent with the terms of the MOU was signed by all parties, including Mansour, and approved by the court (Ricciuti, J.) on February 7, 2018. (Ex. 35). The Estate also filed a Rule 58(a) agreement for judgment as to Suffolk and LCS, which sought the entry of judgment on all counts except Count XI (Punitive Damages) and Count XII (Punitive Damages), which were dismissed by agreement of the parties. (Ex. 36).

6. Events Following Settlement

On December 8, 2017, this court (Wilson, J.) denied Suffolk's motion for partial summary judgment against Mansour on the portion of Suffolk's Coverage Claims seeking a declaration that Mansour had a duty to defend it. The decision concluded that Mansour's duty to defend had not yet arisen, and would not arise until jury determined liability in the Reis wrongful death lawsuit.[11]

On February 28, 2018, Liberty Mutual informed Suffolk that it was allocating $5,500,000 of the $7,500,000 settlement payment to Suffolk and the remaining $2,000,000 to LCS. (Ex. 51). This was the first time that anyone had expressed the view that Suffolk and LCS should not share 50/50 in any settlement amount. The effect of this uneven allocation was to increase Mansour's potential liability. Suffolk objected to this allocation. In an April 24, 2018, email, Attorney Plangemann wrote to Attorney Michael Johnson, Vice President and Senior Corporate Counsel at Liberty Mutual: "I want to get an update from you as to where you are in your pursuit of Mansour/Travelers. I further wanted to better understand your strategy for establishing to Mansour/Travelers that the allocation to the Suffolk file was appropriate based on the underlying case." (Ex. 52).

On July 19, 2018, Liberty Mutual was substituted as the third-party plaintiff on Suffolk's Coverage Claims. On July 26, 2018, Liberty Mutual, as assignee and subrogee of Suffolk, amended the third-party complaint against Mansour, adding claims for violation of G.L c. 93A, § 11 against Travelers. On August 13, 2018, and again on November 2, 2018, Travelers offered to settle with Liberty Mutual for $1,250,000. Liberty Mutual rejected those offers. On May 29, 2020, Travelers increased its settlement offer to $1,375,000. That offer was also rejected.

[11] Apparently, the court was not aware of the settlement because there is no reference to it in the decision.

7. Coverage Trial

By order entered May 12, 2022, the court (Wilson, J.) bifurcated the trial on Liberty Mutual's Coverage Claims against Mansour. The question for Phase 1 was whether Mansour's actions or inactions brought about the accident. If the jury answered that question in the affirmative, the jury would then be asked to determine amounts owed to Liberty Mutual during Phase 2. Following a five-day trial in October 2022, the jury found that Mansour had not breached its contract obligation to defend Suffolk in the Reis wrongful death lawsuit, and no action or inaction of Mansour brought about or provoked the mishap that resulted in Reis's death (Ex. 38). In sum, the jury found that Mansour did not owe Suffolk a duty to defend or indemnify it in connection with the Reis wrongful death lawsuit.

On February 11, 2023, the court (Wilson, J.) denied Liberty Mutual's motion for a judgment notwithstanding the verdict or in the alternative for a new trial (Docket No. 215) ("JNOV Decision"). The decision outlines the evidence presented at trial, which included the testimony of three Mansour employees, and the unsworn recorded statements of three other Mansour employees. Overall, the testimony and statements were conflicting, and did not present a clear picture of any Mansour employee's knowledge that Reis had been working under a suspended load. While the OSHA citation was not admitted, *see Herson v. New Boston Garden Corp.*, 40 Mass. App. Ct. 779, 793 (1996), the decision states that "the evidence, construed against Suffolk, would have supported a verdict that Mansour's employees did not violate OSHA regulations or safe construction practices by knowingly working under suspended loads."

8. Expert Testimony

At the bench trial, Liberty Mutual called David Ives, a retired insurance underwriter with many years of experience in the insurance industry. Based on his review of deposition

transcripts, the claims files, and some of the relevant correspondence and court documents, Ives offered an opinion as to when Mansour's liability became reasonably clear. Specifically, he opined that Mansour's duty to defend was clear by 2016, if not earlier. He further opined that Mansour's duty to indemnify was reasonably clear from the perspective of a reasonable claims person "early on." He noted that Travelers recognized this and said as much in their claims notes. Their recognition of their duty to defend and indemnify was also reflected in the fact that they set reserves, which in Ives's view is the amount you expect to pay on the claim. On cross examination, Ives agreed that once an insurer makes a reasonable offer, it is not required to bid against itself. He also stated that he was basing his opinions on what he understood was strong testimony from Mansour employees that Mansour employees knowingly worked under the suspended loads. This assumption was not supported by the actual evidence admitted at the Coverage Trial, as was set forth in detail in the JNOV Decision.

CONCLUSIONS OF LAW

Liberty Mutual, as Suffolk's assignee and subrogee, brings claims against Travelers alleging unfair claims settlement practices in violation of G.L. c. 176D, § 3. As that statute provides no private cause of action, *Silva v. Steadfast Ins. Co.*, 87 Mass. App. Ct. 800, 803 (2015), Liberty Mutual brings its claims under G.L. c. 93A, § 11. Because the claims arise in a business context, rather than providing per se proof of a c. 93A violation, as is the case for consumers suing under G.L c. 93A, § 9, "a judge may . . . rely on a c. 176D violation *as evidence of* an unfair business practice [for the purpose of] § 11." *Silva*, 87 Mass. App. Ct. at 804 (citation omitted) (emphasis added). *See Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 754 (1993); *Peabody Essex Museum, Inc. v. U.S. Fire Ins. Co.*, 802 F.3d 39, 54 (1st Cir. 2015). "Hallmarks of [business] misconduct [that violates both c. 93A and c. 176D] generally involve

the absence of good faith and the presence of extortionate tactics. . . . Such circumstances include withholding payment from the insured and stringing out the process by using shifting, specious defenses with the intent to force the insured into an unfavorable settlement." *Peabody Essex Museum, Inc.*, 802 F.3d at 54 (citations omitted). Not all G.L. c. 176D violations rise to the level of unfair trade practices under G.L. c. 93A, § 11. *Silva*, 87 Mass. App. Ct. at 804. Here, for the following reasons, Liberty Mutual fails to establish any G.L. c. 176D violation, much less one that rises to the level of a G.L. c. 93A, § 11, commercial trade practice violation.

I. Correct Denial of Coverage

To begin, Liberty Mutual fails to reckon with the legal principle that an insurer "has no duty to settle absent a duty either to defend or to indemnify." *Sanders v. Phoenix Ins. Co.*, 843 F.3d 37, 47 (1st Cir. 2016). Here, the Coverage Trial determined conclusively that Travelers had no duty to defend or indemnify Suffolk because its insured, Mansour, was not a cause of the accident, which was an undisputed prerequisite to coverage under the Policies. "When coverage has been correctly denied . . . no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found." *Transamerica Ins. Co. v. KMS Patriots, L.P.*, 52 Mass. App. Ct. 189, 197 (2001). *See Spurlin v. Merchants Ins. Co. of New Hampshire*, 866 F. Supp. 57, 62 (D. Mass. 1994) (same); *Holmes Grp., Inc. v. Fed. Ins. Co.*, 2005 WL 4134556, at *18 (D. Mass. 2005) (same). *See also Pacific Indem. Co. v. Lampro*, 86 Mass. App. Ct. 60, 68 (2014) ("in light of [insurer's] multiple valid defenses to coverage, [plaintiff's] c. 93A claim [for unfair settlement practices] failed to 'plausibly suggest an entitlement to relief'").[12] Applying this

[12] Liberty Mutual argues that the outcome of the Coverage Trial is not dispositive of its G.L. c. 93A claims, as in the G.L. c. 176D settlement context, "a jury's verdict is not always predictable and may not constitute in all circumstances a definitive measure of reasonableness." *Bobick v. United States Fid. & Guar. Co.*, 439 Mass. 652, 662 (2003). The fact that Travelers prevailed in the Coverage Trial, however, distinguishes this case from the cases that Liberty Mutual cites for that proposition. In each of those cases, coverage was not disputed, and the insured ultimately was found liable for some portion of the fault. *See id.* at 655, 662 n.16; *Chiulli*, 97 Mass. App. Ct. at 250-51; *McLaughlin*, 90 Mass. App. Ct. at 23.

caselaw to the facts here, Liberty Mutual's claims necessarily fail.[13]

II. Settlement Practices

Nevertheless, even if this legal principle does not control the outcome, Liberty Mutual's c. 176D claims still would fall short. It argues that Travelers failed to offer sufficient settlement funds when Mansour's liability was reasonably clear, as required by G.L. c. 176D, § 3(9)(f). As explained below, however, the facts adduced at trial do not establish that liability ever became reasonably clear prior to the Coverage Trial, so as to trigger a duty to settle on Travelers's part. Moreover, even had that duty arose, the settlement offer that Travelers did make was reasonable.

A. Mansour's Liability

Under G.L. c. 176D, § 3(9)(f), "[a]n insurer's duty to settle arises when 'liability has become reasonably clear.'" *O'Leary-Alison v. Metro. Prop. & Cas. Ins. Co.*, 52 Mass. App. Ct. 214, 217 (2001) (quoting G.L. c. 176D, § 3(9)(f)). The standard to be applied is an objective one, based on an "assessment of the facts known or available at the time." *McLaughlin v. American States Ins. Co.*, 90 Mass. App. Ct. 22, 31 (2016). In other words, "[t]he fact finder determines whether a reasonable person, with knowledge of [those] relevant facts and law, would probably have concluded, for good reason, that the insure[d] was liable to the plaintiff." *O'Leary-Alison*, 52 Mass. App. Ct. at 217 (citation omitted). Insurers do not have an obligation to settle as to an insured whose liability is not reasonably clear. *Id.* "Liability is not 'reasonably clear' if there is 'a legitimate difference of opinion as to the extent of [the insured's] liability,' or a 'good faith disagreement' over the amount of damages." *Chiulli* v. *Liberty Mut. Ins., Inc.*, 97

[13] The cases cited *supra* each concern an insurer's denial of coverage based all or in part on its interpretation of the relevant policy at issue, which interpretation was ultimately determined to be legally correct. *See Pacific Indem. Co.*, 86 Mass. App. Ct. at 65-67; *Transamerica Ins. Co.*, 52 Mass. App. Ct. at 192-96; *Sanders*, 843 F.3d at 42-47; *Spurlin*, 866 F. Supp. at 58; *Holmes Grp., Inc.*, 2005 WL 4134556, at *15. The coverage determination in this case did not involve a dispute about the policy language, but, rather, turned on Mansour's causation of the accident, which was a purely factual determination. The court considers this difference to be immaterial. However, in an abundance of caution, the court engages in the additional analysis *infra*, which leads to the same result, in any event.

Mass. App. Ct. 248, 256 (2020) (quoting *Bobick* v. *United States Fid. & Guar. Co.*, 439 Mass. 652, 660 (2003)). "Liability, as the word is used in this context, 'encompasses both fault and damages.'" *O'Leary-Alison*, 52 Mass. App. Ct. at 217 (quoting *Clegg v. Butler*, 424 Mass. 413, 421 (1997)).

Here, as stated, Liberty Mutual has failed to prove that Mansour's liability became reasonably clear at any particular time. Shortly before the First Mediation, Liberty Mutual had not even determined whether Suffolk and LCS's liability was reasonably clear, as Attorney Tighe, on behalf of Liberty Mutual, informed the Estate's attorney in his September 8, 2017, letter. Indeed, it *never* conceded Suffolk's liability. In interrogatories, Travelers asked Liberty Mutual to "[i]dentify the date by which [it] contended that liability (fault and damages) of Suffolk became reasonably clear in the [Reis wrongful death action]." On April 3, 2019, Liberty Mutual answered that Suffolk's liability "never became reasonably clear."

Despite its own view that Suffolk's liability was unclear, Liberty Mutual argues that since Travelers's claims notes reflect that it was anticipating that it would have to indemnify Suffolk, that subjective believe that liability was reasonably clear is sufficient to require an offer of settlement. The argument fails for several reasons. First, whatever Travelers's subjective belief was, it is not the controlling standard of review, which requires an objective assessment of the facts. *McLaughlin*, 90 Mass. App. Ct. at 31. Second, most of the claims notes were authored by Katsigianis, who was a claims adjuster, not a lawyer. Thus, his notes cannot be interpreted as a binding assessment of legal liability - i.e., "both fault and damages." *O'Leary-Alison*, 52 Mass. App. Ct. at 217. Rather, the increasing settlement authority amounts represented the maximum that Travelers was willing to contribute based on their assessment of the risk of liability, not what it even subjectively believed would be owed or whether Mansour was actually liable. In

other words, potential exposure is not the same as reasonably clear liability. Indeed, as to fault, Travelers never conceded the issue, and chose instead to try it to a jury. *See Calandro v. Sedgwick Claims Mgt. Servs., Inc.*, 919 F.3d 26, 35 (1st Cir. 2019) (conclusion that insurer's internal email exchanges did not concede liability strengthened in part by fact that causation issue was ultimately tried before a jury). The testimony of Liberty Mutual's expert witness, David Ives, changes nothing in this analysis, as his opinion was based on incorrect information about the evidence regarding Mansour's fault. *See supra* at 12-13.

That Travelers set aside substantial reserves and granted substantial settlement authority prior to the First and Second Mediations, while indicative of Travelers' views of it potential exposure, likewise does not change the analysis. Neither constitutes an admission of liability with respect to Mansour's duty to defend and indemnify Suffolk. *See Bohn v. Vermont Mut. Ins. Co.*, 922 F.Supp.2d 138, 147 (D. Mass. 2013) ("The fact that defendant raised its reserve for plaintiff's claim following both of its 'roundtable' meetings, in October, 2006 and June, 2008, suggests that the insurer reasonably recognized that its liability had become more likely but it does not mean that liability had become 'reasonably clear' as to both fault and damages" [emphasis supplied]).

Ultimately, what is needed for Liberty Mutual to have any chance at success— and what is entirely lacking here — is any compelling factual evidence of Mansour's causation of the accident, prior to and at the time of the settlement negotiations and mediations, of which Travelers knew, and which reasonably would have led a reasonable insurer in its shoes to conclude that Mansour's liability was clear. Indeed, the trial record is glaringly devoid of timely investigation results, interviews, or any other evidence that would be determinative on this key issue. In the absence thereof, Travelers's refusal to concede that point was a good faith decision

that did not violate G.L. c. 186, § 3(9)(f). *See Dorchester Mut. Ins. Co. v. Krusell*, 485 Mass. 431, 447 (2020) (no violation of G.L. c. 176D, § 3(9)(f) where, based on facts known to insurer at the time, liability remained unclear). *See also Pacific Indem. Co.*, 86 Mass. App. Ct. at 68 ("[o]ur decisions interpreting the obligations contained within G.L. c. 176D, § 3(9), in no way penalize insurers who delay in good faith when liability is not clear and requires further investigation" [citation omitted]).

The results of the Coverage Trial confirm this conclusion. Although settlement offers must be made in good faith in light of the insurer's knowledge at the time of the relevant facts and law concerning the claim, the court may consider after-acquired evidence that "merely confirmed the insurer's reasonable basis to resist settlement." *Silva v. Norfolk & Dedham Mut. Fire Ins. Co.*, 91 Mass. App. Ct. 413, 418 (2017). Such is the case here. As thoroughly discussed and catalogued in the JNOV Decision, the evidence that Mansour caused the accident was weak and contradictory, and it was well within the jury's authority to reject it.[14]

B. Reasonable Settlement Offer

Travelers also made a reasonable settlement offer, even though, as determined, it had no legal duty to do so. Katsigianis came to the Second Mediation with $2,000,000 of authority and offered $1,000,000, at the beginning of the day. Significantly, Katsigianis did not make that offer contingent on a release from Suffolk; thus, Liberty Mutual could have accepted the $1,000,000 and pursued Travelers for more money at a later date. Katsigianis heard no reply regarding the offer until he was told that Suffolk was going to settle the case on its own and

[14] It is also notable that Judge Wilson denied Suffolk's motion for partial summary judgment on December 8, 2017, finding that as of that date, Mansour's liability had not been established. While Judge Wilson decided this issue on a summary judgment standard, that is whether there were disputed facts as to Mansour's liability, it remains true that as of the date of his decision, Mansour's liability was far from clear. Liberty Mutual renewed the motion for summary judgment on February 20, 2020, and Judge Wilson again denied it stating that the issue must be determined at trial.

"deal with Travelers later." Katsigianis was never given the opportunity to increase his settlement offer on behalf of Mansour, or otherwise participate in the settlement. Liberty Mutual's decision to settle the Reis wrongful death lawsuit without any participation from Travelers on behalf of Mansour was not without risk. It could have accepted the $1,000,000 offer and reserved its right to seek additional contribution, or it could have countered with a larger amount with the hope of increasing Travelers's offer. Liberty Mutual also could have accepted Travelers's settlement offers in 2018 and 2020, which went as high as $1,375,000. It rejected all these options and, as it was free to do, chose to further litigate Mansour's obligation to defend and indemnify Suffolk. That further litigation resulted in a verdict for Mansour.

Moreover, the amount Liberty Mutual agues it was entitled to as a reasonable settlement from Travelers, over $2,700,000, is not supported by the record for a number of reasons. Contrary to prior expectations, the $7,500,000 that Suffolk and LCS agreed to pay to settle was not allocated evenly. Liberty Mutual decided to allocate $5,500,000 to Suffolk and the remaining $2,000,000 to LCS. This allocation was a surprise to Suffolk, which objected to it. The uneven allocation increased Mansour's potential liability to $2,750,000. Had the amount been allocated equally as all parties had previously assumed it would be, Mansour's potential liability would have been $1,875,000, an amount well within Travelers settlement authority and only $500,000 less than what Travelers offered on May 29, 2020. There was no evidence before the court of a rational basis for the unequal allocation, other than concerns that Suffolk had about uninsurable punitive damages for which Mansour was not liable. The reason for the unequal allocation was even unclear to Attorney Plangemann at Suffolk as late as April 24, 2018, when she asked Attorney Mike Johnson at Liberty Mutual in an email about how the allocation was going to be explained to Mansour/Travelers.

Concern for punitive damages indisputably grew at the First Mediation, where Reis's wife made an emotional and compelling presentation and the Estate focused on Suffolk.[15] It is also notable that every additional dollar added after the First Mediation was allocated to Suffolk.[16] The court agrees with Travelers that even though the final settlement documents state that the payments are not for punitive damages, there is no other logical explanation for the large increase in the allocation of settlement proceeds to Suffolk, other than that Liberty Mutual was trying to unreasonably increase Mansour's exposure. Either way, this allocation could not have been reasonably clear to Travelers, and therefore, Traveler's had no duty to settle at the high amount Liberty Mutual is suggesting it should have.

Neither was Travelers required to offer an amount at the higher end of its settlement authority at the Second Mediation. Parties are not required to offer the entire amount of their authority up front. Rather, it is standard for parties to begin negotiations below the full amount they are willing to pay to settle the case, which is what Travelers did here. *See Bobick*, 439 Mass. at 661-62 (G.L. c. 176D, § 3(9) "does not call for [a] defendant's final offer, but only one within the scope of reasonableness. Experienced negotiators do not make their final offer first off, and experienced negotiators do not expect it, or take seriously a representation that it is" [citation omitted]). Under the circumstances, where Liberty Mutual did not counter Travelers's offers or seek a larger amount during the Second Mediation, the court cannot find that Travelers engaged in unfair settlement practices at the Second Mediation when it only offered $1,000,000. Likewise, the increasing settlement offers that Travelers made were reasonable in light of the facts of this case.

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[15] The Estate's attorney, Paul Kelleher, testified that the mediator raised the issue of the potential for punitive damages at the First Mediation.

[16] At the First Mediation, the proposed allocation was $2,000,000 LCS and $2,000,000 to Suffolk. The final allocation ended up as $5,500,000 million to Suffolk and $2,000,000 to LCS.

III. Conclusion

In sum, Liberty Mutual has adduced absolutely no evidence that Travelers's conduct in connection with this case constituted an objective G.L. c. 176D, § 3 violation, or that it engaged in a bad faith effort to "deliberately [] derail the settlement process'" such that G.L. c. 93A, § 11 was nevertheless violated. *Parker v. D'Avolio*, 40 Mass. App. Ct. 394, 395 (1996). Accordingly, for the reasons set forth, Travelers is entitled to judgment on Liberty Mutual's third-party complaint against it.[17]

ORDER

For all of the above reasons, judgment shall enter for defendants Mansour Construction, Inc., Travelers Indemnity Company, and St. Paul Fire and Marine Insurance Company; and against plaintiff Liberty Mutual Insurance Company on Liberty Mutual's G.L. c 93A claims against Defendants. The third-party amended complaint against Defendants is hereby **DISMISSED**.

Hélène Kazanjian
Justice of the Superior Court

DATE: February 5, 2024

[17] Because Liberty Mutual's claims fail for the numerous reasons discussed, the court need not address the further issue of lack of proof of causation and/or loss, given the result of the Coverage Trial and that all the defense costs were paid by LCS. *See Rawan v. Continental Cas. Co.*, 483 Mass. 654, 674 (2019) ("[e]ven when an insurer's conduct is unfair or deceptive in violation of G. L. c. 93A, the [plaintiffs] must prove that the insurer's conduct was the cause of any loss [they] sustained" [citation omitted]).