

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION 12-00205

ANTHONY G. MORGAN

vs.

MASSACHUSETTS HOMELAND INSURANCE COMPANY

FINDINGS OF FACT, RULINGS OF LAW AND
MEMORANDUM OF DECISION

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JUL 13 2015

John J. [Signature]
CLERK OF COURTS

The plaintiff, Anthony Morgan, brought this action against his automobile insurer, Massachusetts Homeland Insurance Company ("Homeland"), complaining that Homeland's handling of Morgan's total loss claim, and in particular its valuation of Morgan's vehicle, violated G. L. c. 93A and G. L. c. 176D.¹ Based on the credible evidence adduced at trial and the reasonable inferences that can be drawn therefrom on that sole claim, and after thorough review of the evidence including the numerous exhibits entered, the Court makes the findings of fact as stated below.

FINDINGS OF FACT

On January 9, 2011, Morgan lost control of his vehicle, a 2005 Chevrolet Colorado truck, while driving on an icy road in Westfield. The vehicle was insured under a standard policy issued by Homeland. By January 12, 2011, Homeland's appraiser inspected the vehicle and determined that the damage to it was a total loss, thus triggering Homeland's obligation to tender to Morgan an equitable settlement amount for the vehicle's actual cash value, plus the 6.25 % sales tax on that amount and less the \$500 deductible under the policy. On January 13,

¹Morgan initially brought two other claims, of which one was dismissed by stipulation (Count 1 for breach of contract) and the other which was dismissed at summary judgment (Count 3, alleging violations of G. L. c. 93A and G.L. c. 176D on behalf of a putative class).

Homeland informed Morgan by telephone that it had determined that the vehicle was a total loss and that Homeland's total loss adjuster would call Morgan to discuss it. Morgan agreed to look for the title to the vehicle, as he explained to Homeland that he had just paid off the loan on the vehicle two months before the accident.

On January 20, Homeland's adjuster, Jeanette Fortier, informed Morgan by telephone that Homeland's valuation of his vehicle was \$11,891. Homeland reached this initial valuation using a market valuation report generated from a software program valuation product by a third party, Certified Collateral Corporation (CCC). The CCC report states that the "Proposed Settlement Amount is calculated entirely from the comparable vehicles with adjustments to reflect the loss vehicle configuration." The CCC valuation took into account Morgan's vehicle's negative factors (condition, lack of tilt wheel, cruise control and CD player) and positive factors (lower than average mileage, aluminum/alloy wheels, fog lamps, soft tonneau cover and trailering package). The CCC report notes that its valuation was derived from 12 comparable vehicles available or recently sold in the marketplace. The CCC report states that Morgan's vehicle was in average condition except for the front tires, which were in rough condition.

Upon hearing of Homeland's initial \$11,891 valuation, Morgan replied that he was entitled to be paid the retail book value of his vehicle as determined by another valuation source, the National Automobile Dealers Association ("NADA"), and he further claimed that the retail value of his vehicle exceeded \$14,000. Fortier then requested supporting documentation for Morgan's \$14,000 figure. Within three hours of that January 20th telephone call, Morgan, through his attorney, rejected Homeland's \$11,891 offer, demanded a settlement offer of \$15,225, and notified Homeland of his intent to send a c. 93A demand letter.

Two weeks later, on February 11, Morgan's attorney sent Homeland the c. 93A letter which Homeland received on February 14th. In it, Morgan reduced his demand to \$14,750 to reflect a vehicle valuation of \$14,500 based on a NADA report which Morgan attached to the letter.² The NADA report was dated January 25, 2011, and showed that Morgan's vehicle had a clean retail value of \$14,500 and a clean trade-in value of \$11,325, which exceeded Homeland's initial valuation of \$11,891. The demand letter gave Homeland "30 days from its receipt of this letter to meet [the] demands set out below or otherwise reasonably resolve this dispute."

On February 17, Homeland responded to Morgan's c. 93A demand letter that the actual cash value of Morgan's vehicle was \$11,891 as determined by a local market analysis. By February 23, Homeland increased its valuation to \$13,024.66, which it stated reflected an average of the valuations under NADA, another commercial retail book value service, Auto Trader, and CCC.

Two weeks later, on March 7th, Morgan, through his attorney, asked Homeland for a total settlement amount of \$14,003.12, and Morgan sent Homeland the certificate of title to the vehicle, without which Homeland could not issue the settlement payment.

Also on March 7th, Homeland increased its vehicle valuation to \$13,650. After adding sales tax in the amount of \$853.12 and subtracting the \$500 deductible, the total amount of this final settlement offer was \$14,503.12. On March 9, Morgan accepted a check in that amount. The check states, "In payment of: collision total loss settlement inv.# total loss settlement." Homeland never requested nor obtained an express release from Morgan regarding his claim that

²Morgan's total demand figures are based upon a 5% sales tax rate, while Homeland's are based correctly upon a 6.25% rate.

Homeland violated G. L. c. 176D and G. L. c. 93A.

Morgan filed this action on March 8, 2012. At trial, the issues were (1) whether Homeland's valuation of Morgan's vehicle and settlement offers violated G. L. c. 176D and G. L. c. 93A; (2) if so, whether Morgan suffered damages from the improper valuation and timing of the settlement; and (3) whether the settlement check Morgan accepted covered Morgan's statutory claims, thus barring further recovery, or whether it only covered Morgan's underlying insurance claim.

RULINGS OF LAW

1. Statutory and Regulatory Violations

Homeland's obligation under G. L. c. 176D, § 3 (9)(f), is to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." See G. L. c. 176D, § 3 (9)(f). General Laws c. 93A required Homeland to have made a reasonable settlement offer within 30 days of receiving Morgan's demand letter. See G. L. c. 93A, § 9(3) ("[a]ny person receiving [a written demand for relief] who, within thirty days . . . 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"). Together, G. L. c. 176D, § 3 (9)(f), and G. L. c. 93A, § 9, mandate insurers to put a fair and reasonable offer on the table when liability and damages become reasonably clear, either within the 30 day period set forth in G. L. c. 93A, § 9(3), or as soon thereafter as liability and damages make themselves apparent. See G. L. c. 176D, § 3 (9)(f); G.L. c. 93A, § 9.

The determination of the cash value for a vehicle whose damage amounts to total loss is subject to the Standards for the Repair of Damaged Motor Vehicles set forth in 211 Code Mass. Regs. § 133.005, which lists four factors, all of which must be considered by the insurer. See 211 Code Mass. Regs. § 133.005. These factors are: (1) "the retail book value for a motor vehicle of like kind and quality, but for the damage incurred;" (2) the price paid for the vehicle, plus improvements and less depreciation; (3) prior damage reduction (which is inapplicable here); and (4) the actual cost of purchasing an available vehicle of like kind and quality. The purpose of this regulation is to "promote . . . fair and uniform standards" for the "appraisal and repair of damaged vehicles." 211 Code Mass. Regs. § 133.001; 212 Code Mass. Regs. § 2.01(1).

Homeland's initial valuation of \$11,891 did not consider the first regulatory factor, the retail book value, for Morgan's vehicle. Accordingly, Homeland violated 211 Code Mass. Regs. § 133.005, which violation in turn constitutes a violation of G. L. c. 93A. See 940 Code Mass. Regs. § 3.16 ("[A]n act or practice is a violation of M.G.L. c. 93A, § 2, if: . . . (3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's . . . welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection. . . .").

However, the credible evidence not support an inference that Homeland's violation was willful or, as explained below, that it caused Morgan harm. Although Homeland's initial offer on January 20 was based on a valuation which ran afoul of the regulation, by March 7th, it raised that valuation by \$1,759 after using tools, including NADA, which took into account all of the relevant factors. Homeland extended a reasonable settlement offer to Morgan within three weeks of receiving the c. 93A demand letter, well within the thirty day deadline set forth in that letter.

Therefore, despite violating 211 Code Mass. Regs. § 133.005 and consequently G. L. c. 93A with its initial valuation of Morgan's vehicle, these violations were not willful and that Homeland did not fail to effectuate a prompt and equitable settlement.

2. Damages

General Laws c. 93A, § 9, creates a cause of action for consumers who are injured as a result of an unfair or deceptive act or practice. *Hershenow v. Enterprise Rent-a-Car Company of Boston*, 445 Mass. 790, 800-802 (2006). As a precondition for recovery, Morgan must meet his burden of establishing that Homeland's handling of the total loss claim caused him an injury. See *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 401 (2004). See *id.*: *Siegel v. Berkshire Life Ins. Co.*, 64 Mass. App. Ct. 698, 702 n.3 (2005). A plaintiff who has suffered no harm is not entitled to a nominal damages award which would, in turn, entitle him to recover attorney's fees. See *Aspinall, supra* at 401. A *per se* unfair and deceptive act, such as a regulatory violation which does not cause harm to a plaintiff, does not entitle that plaintiff to any recovery under G. L. c. 93A. See *Hershenow v. Enterprise Rent-a-Car Company of Boston*, 445 Mass. at 801-802.

Notwithstanding Homeland's initial regulatory violation, the CCC valuation method employed by Homeland did not yield a valuation below the vehicle's actual cash value as would have been reached by considering all of the factors set forth in 211 Code Mass. Regs. § 133.005. Instead, Homeland's initial valuation was slightly higher than the NADA valuation of \$11,325 for a clean trade-in vehicle. Therefore, Homeland's noncompliance with 211 Code Mass. Regs. § 133.05 did not harm Morgan, and amounts to no more than a *per se* unfair and deceptive act which does not entitle him to recovery. See *Hershenow*, 445 Mass. at 801-802.

Morgan claims that Homeland's handling of this claim damaged him in several other ways: (1) Homeland delayed payment of Morgan's claim. (2) Morgan was required to seek legal counsel. (3) Morgan had to make a written c. 93A demand that Homeland comply with the regulations governing the determination of actual cash value. (4) Morgan had to use financial savings to purchase a motor vehicle while waiting for Homeland's payment.

There is no support for Morgan's argument that Homeland caused an unreasonable delay in paying him the settlement funds. Morgan's c. 93A letter with the requested NADA documentation expressly gave Homeland 30 days -- until March 14, 2011--to respond. and Homeland reached an agreement and extended the accepted offer within that period. on March 7. Homeland's payment was not unreasonably or significantly delayed, but came immediately after Morgan provided the requisite certificate of title. Morgan was not harmed by having to use financial savings to purchase a motor vehicle within that brief period.

Further, Morgan has not shown that Homeland's actions required him to seek legal counsel. where he had already consulted his attorney before speaking with Homeland. Just three hours after Morgan first obtained Homeland's initial valuation of the vehicle and demanded \$14,000, his attorney raised the demand by \$1,225 and informed Homeland that he would send a c. 93A demand letter. Although Morgan's use of an attorney and the G.L. c. 93A letter likely helped him, neither was required in order for Morgan to negotiate and reach a fair claim settlement. Morgan's failure to show that Homeland's conduct caused him any injury is fatal to his claim. See *Hershenow*, 445 Mass. at 800-802.

These findings and rulings obviate the need to address the issue of whether the settlement check accepted by Morgan covered his statutory claims or only the underlying insurance claim.

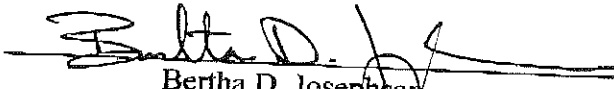
CONCLUSION

For the reasons stated above:

(1) judgment shall enter on Count 2 of the plaintiff's complaint in favor of the defendant, Massachusetts Homeland Insurance Company; and

(2) Massachusetts Homeland Insurance Company's Motion for Judgment at the Close of All Evidence is **DENIED** as moot.

Each party shall pay its own costs.


Bertha D. Josephson
Justice of the Superior Court

Dated: July 9, 2015