A recent Massachusetts Appeals Court case has changed the potential exposure for an insurer failing to offer a reasonable settlement in a timely manner. In a surprise ruling in *Rhodes, et al. v. AIG Domestic Claims, Inc., et al* (slip opinion, November 24, 2010) the Massachusetts Court of Appeals answered the question of whether a plaintiff is required to prove causation and damages when making a claim against an insurance company for failing to offer a prompt settlement in a case where liability was clearly established by holding that a plaintiff has a very low threshold in what they must show to prove causation and. Post *Rhodes*, simply failing to offer a prompt and reasonable settlement when liability is reasonably clear will expose an insurer to punitive damages under the Massachusetts Consumer Protection statute (M.G.L. c.93A).

In *Rhodes*, a jury found against the claims administrator for an insurance company that insured an 18-wheel trailer truck which hit the plaintiff's vehicle from behind, leaving her permanently paralyzed. Less than five months after her injury, a third-party administrator characterized her claim as "catastrophic" and reported that liability was clear. That same month, the Plaintiff filed suit against the driver and his employer as well as against the insurer under M.G.L. c. 93A and c. 176D. Shortly thereafter, the plaintiffs sent a written demand for $16.5 million, which went unanswered. In the ensuing months, the third-party administrator provided the Defendant with an estimated value of the Plaintiff's case between $5 million and $10 million.

The Plaintiff agreed to mediate, but the Defendant refused, claiming the need for more discovery. Only when they got close to the trial date did the Defendant finally agree to mediate. At mediation, Defendant offered to settle for $3.5 million. There was testimony that the Plaintiff would not have accepted a settlement offer of less than $8 million at that time.

The trial was on damages only and the jury returned a $9.412 million judgment. With interest and adjustments, the total came to $11.3 million. At a separate jury-waived trial against the insurer, the trial court found the Plaintiff incurred costs appurtenant to and suffered emotional distress from the uncertainties of litigation as the matter dragged on past the point at which liability was clear and a settlement offer from defendant was statutorily due. But, looking at what the plaintiff would have accepted at the mediation, the trial judge held that a timely offer would not have materially diminished the Plaintiffs' harm because they would have proceeded with litigation anyway.

The Appellate Court reversed the trial judge for improperly considering evidence that the Plaintiff would not have accepted a late settlement offer of $3.5 million even if it had been made within the statutorily prescribed time period. Thus, Massachusetts law now provides that even a reasonable settlement offer, if made late, no longer going to remove the specter of punitive damages under Chapter 93A.According to the Appellate Court, an insurance company's duty to make a prompt and fair settlement offer does not depend on the willingness of the claimant to accept it. Even an outrageous demand on the part of a plaintiff does not relieve an insurer of its obligation to make a reasonable offer. Damages are now determined by looking at the time between when the insurance company breached its duty to make an initial offer and the date a reasonable offer was finally made.

Finding that the Defendant was willing to risk a deliberate violation of the law in the hope that the Plaintiff's mounting frustrations and financial strain would work to the insurer's benefit,

noting that the treble damages provision of Chapter 93A was designed to deter such a strategy, the Appeals Court stated:[E]vidence that they would not have settled their claims for less than $8 million at mediation, less than a month before trial, was speculative as proof of whether they would have settled … had [Defendant] put forth a reasonable offer months earlier… Given the uncertainty of the effect that unfair settlement practices and prolonged pretrial maneuvering may have on the claimant's circumstances and outlook when a late settlement offer finally is made, we think the plaintiffs' recovery here should not turn on conjecture as to what they might have done had [Defendant] not abused its position."

The Appellate Court did conclude, however, that damages should not be measured by using the $11 million judgment obtained at trial. "[D]amages should be calculated between the time [Defendant] breached its duty to make the initial offer, and the date the reasonable offer finally was made and rejected" as the Appeals Court does not want to deter an insurer from making a settlement offer late if it had already failed in making the initial offer. However, the trial court appears to retain the discretion to decide upon what information punitive damages should be calculated.