# Commonwealth of Massachusetts
# Supreme Judicial Court

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**DAR-31213**
**Appeals Court Case No. 2026-P-1470**

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PEERLESS INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AND OHIO CASUALTY INSURANCE COMPANY,

*Plaintiffs-Appellants*,

*v.*

JOHN ROONEY,

*Defendant-Appellee.*

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On Appeal from a Judgment of the
Superior Court for Suffolk County, No. 2284CV00652

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**BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR DIRECT APPELLATE REVIEW**


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Chamber of Commerce of the United States of America (Chamber), by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of the Chamber: None.
2. Publicly-Held Corporation(s) Owning More Than 10% of the Chamber Stock: None.

Pursuant to Supreme Judicial Court Rule 1:21, Associated Industries of Massachusetts (AIM), by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of AIM: None.
2. Publicly-Held Corporation(s) Owning More Than 10% of AIM Stock: None.

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## ISSUES PRESENTED

1. Whether the Superior Court legally erred in concluding that an insured's liability is "reasonably clear"—such that an insurer commits an unfair claim settlement practice in violation of Chapter 176D by failing to offer settlement—whenever a reasonable person "would probably" have concluded that the insured was liable, rather than applying this Court's standard under which liability is reasonably clear only when "no reasonable insurer would have failed to settle the case."

2. Whether the Superior Court legally erred in finding a "willful" violation of Chapter 93A, notwithstanding the reliance of Peerless Insurance Company, Liberty Mutual Fire Insurance Company, and Ohio Casualty Insurance Company (together, "Liberty") on diligent and good faith evaluations of defense counsel and an independent trial observer.

## INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business organization. As the nation's leading advocate for business,

[1] The Chamber and AIM declare, in accordance with Mass. R. App. P. 17(c)(5), that: (1) no party, nor any party's counsel, has authored this brief in whole or in part; (2) no party, nor any party's counsel, has contributed money that was intended to fund preparing or submitting this brief; (3) no person or entity—other than the Chamber, AIM, or their counsel—has contributed money that was intended to fund preparing or submitting this brief; and (4) neither the Chamber, AIM, nor their counsel represents or has represented one of the parties to this case in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including in support of applications for direct appellate review in this Court. *See, e.g.*, *Healey v. Facebook, Inc.*, No. DAR-27419 (Apr. 23, 2020).

Founded more than one hundred years ago, Associated Industries of Massachusetts (AIM) is a nonprofit association located in Boston. With over 3,400 employer members doing business in Massachusetts, it is the largest business association in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees and the prosperity of the Commonwealth by improving the economic climate of Massachusetts, proactively advocating for fair and equitable public policy, and providing relevant and reliable information and excellent services. AIM likewise frequently participates as an *amicus curiae* in cases pending before this Court. *See, e.g.*, *Anaplan Parent, LP v. Brennan*, No. SJC-13917 (Aug. 19, 2026).

The proper and consistent interpretation of Chapter 176D, § 3(9) is highly important to the Chamber, AIM, and their members. Insurers currently face significant uncertainty in evaluating claims and deciding when and whether to settle a matter in light of the conflicting standards promulgated by this Court in *Hartford Casualty Insurance Co. v. New Hampshire Insurance Co.*, 417 Mass. 115 (1994), and the

Appeals Court in *Demeo v. State Farm Mutual Automobile Insurance Co.*, 38 Mass. App. Ct. 955 (1995), regarding when liability is "reasonably clear" under the statute. Further, many of the Chamber and AIM's members are Massachusetts businesses that purchase liability insurance, and they have a direct interest in how courts apply the standards governing settlement and multiple damages under Chapters 93A and 176D. This case provides the Court an opportunity to clarify the law and eliminate this uncertainty. Furthermore, the Superior Court's conclusion that Liberty was willful in failing to settle this matter notwithstanding the contemporaneous advice of capable and experienced counsel is wrong as a matter of law, and could be used to advocate for a dramatic expansion in the availability of multiple damages under Chapter 93A and similar statutes. The Chamber and AIM thus have a considerable interest in the Court's direct and prompt review of the Superior Court's judgment.

## INTRODUCTION

The Massachusetts insurance-specific consumer protection statute, Chapter 176D, § 3(9), identifies certain enumerated practices as "[u]nfair claim settlement practices." As relevant here, "[f]ailing to effectuate prompt, fair, and equitable settlement of claims in which liability has become reasonably clear" qualifies as an unfair practice under the statute. G.L. c. 176D, § 3(9)(f). Because a violation of Chapter 176D is a *per se* violation of Chapter 93A, a violation found to be willful or knowing requires the court to award a successful plaintiff multiple damages. G.L. c. 93A, § 9.

The Superior Court's conclusion that Liberty was liable—and willfully so—requires this Court's review for two reasons. First, as the Superior Court's decision reflects, there is ongoing disagreement in the caselaw regarding when liability is "reasonably clear" under Chapter 176D. This Court has provided that an insurer must settle in circumstances where "no reasonable insurer would have failed to settle the case within the policy limits." *Hartford Cas. Ins. Co. v. N.H. Ins. Co.*, 417 Mass. 115, 121 (1994). The Appeals Court, by contrast, has stated that the standard for whether liability is "reasonably clear" asks "whether a reasonable person, with knowledge of the relevant facts and law, would *probably* have concluded, for good reason, that the insurer was liable to the plaintiff." *Demeo v. State Farm Mut. Auto. Ins.*, 38 Mass. App. Ct. 955, 956–57 (1995) (emphasis added). In many cases, including this one, those standards are materially different—notwithstanding the Superior Court's conclusion to the contrary. Insurers are thus faced with an intractable problem: settle early even where they believe liability or damages may not be altogether clear, or litigate close cases and risk liability if, in a court's *ex post* review, they should have settled earlier.

Direct appellate review is independently warranted to evaluate the Superior Court's willfulness determination. The Superior Court held that Liberty willfully violated its duty to settle, even where both its insured's undisputedly experienced counsel and an independent trial observer informed Liberty that it had a reasonable chance of securing a favorable verdict at trial. Willfulness should not attach merely

because those assessments ultimately proved mistaken. The court's decision collapses a two-tier scheme—which reserves multiple damages for the most culpable offenders—into a single level. And, if upheld, it risks a significant expansion of the scope and degree of liability under Chapter 93A and similar statutes that multiply damages upon finding a willful or knowing violation.

## ARGUMENT

### I. This Court's guidance is needed to clarify the standard for liability under Chapter 176D.

The Superior Court's decision in this case reflects ongoing confusion surrounding the proper standard for evaluating liability under Chapter 176D. The "no reasonable insurer" standard this Court previously adopted cannot be squared with the "a reasonable person" standard the lower courts continue to apply. The Superior Court's mistaken conclusion that the standards lead to the same outcome in this case merely underscores the confusion surrounding the proper approach to liability—confusion that will persist absent a ruling from this Court addressing the conflict.

#### A. The *Hartford* and *Demeo* standards cannot be reconciled.

"[A] good faith dispute … is not the stuff of which a c. 93A claim is made." *Duclersaint v. Fed. Nat'l Mortgage Ass'n*, 427 Mass. 809, 814 (1998). Applying this principle, this Court has repeatedly recognized that reasonable disagreements regarding liability and the scope of coverage cannot support a violation of Chapter 176D. "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. Com. Ins. Co.*, 36 Mass. App. Ct. 339, 343 (1994). Put differently, an "absence of good faith and the presence of extortionate tactics generally characterize the basis for a 93A—176D action based on unfair settlement practices." *Id.* at 344; *see also McGilloway v. Safety Ins. Co.*, 488 Mass. 610, 618 (2021) (recognizing that "[r]ecovery under G.L. c. 93A for a violation of G.L. c. 176D, § 3(9), is unlikely when '[a]n insurance company . . . in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy.'" (quoting *Gulezian v. Lincoln Ins. Co.*, 399 Mass. 606, 613 (1987))).

On the specific question whether liability is "reasonably clear" under Chapter 176D, § 3(9)(f), this Court has explained that "[t]he test is not whether a reasonable insurer might have settled the case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits." *Hartford*, 417 Mass. at 121. In other words, Chapter 176D applies to an insurer who refuses to settle when any reasonable insurer in the same position necessarily would have settled. *See id.*; *see also Bobick v. U.S. Fid. & Guar. Co.*, 439 Mass. 652, 659–60 (2003) (liability under Chapter 176D does not attach when there is a "legitimate difference of opinion" regarding the relevant circumstances). This principle applies to uncertainty with respect to damages as well as liability: Even when "fault on the part of [insured] may have been ascertained," an insurer has no obligation to settle where the apportionment of damages between parties is "still the subject of

good faith disagreement." *Id.* at 660.

The Appeals Court broke with this approach in *Demeo*. There, the court concluded that liability under Chapter 176D turns on "whether a reasonable person, with knowledge of the relevant facts and law, would *probably* have concluded, for good reason, that the insurer was liable to the plaintiff." *Demeo*, 38 Mass. App. Ct. at 956–57 (emphasis added). That is a qualitatively different standard. Under *Hartford*, an insurer is unreasonable if a reasonable insurer in its shoes would *necessarily* have chosen to settle. Under *Demeo*, by contrast, an insurer is unreasonable merely because a reasonable insurer *probably* would have settled—allowing for liability even where there was still a "good faith disagreement" regarding either liability or the extent of damages. *Bobick*, 439 Mass. at 660. This departure from *Hartford* has persisted for too long, creating confusion in the trial courts, and this case presents the proper vehicle to cure it.

### B. The Superior Court's approach forces insurers to settle when the statute does not require it.

The tension between *Hartford* and *Demeo* creates considerable and widespread uncertainty for insurers, as this case illustrates. It is often the case that liability and damages are possible but far from assured. In that circumstance, must the insurer settle, or may it allow a case to continue to trial? In line with the goals of c. 93A, *Hartford* penalizes clearly unreasonable behavior by insurers—situations where an insurer refuses to settle even where no reasonable insurer would have taken a case to

trial. *See Hartford*, 417 Mass. at 121; *Clegg v. Butler*, 424 Mass. 413, 421–22 (1997) (violation of duty to settle where "it was highly probable that [insurer] would be liable to the full extent of its policy"). But *Demeo*'s continued vitality—exemplified by the Superior Court's decision below—reflects that insurers cannot rely on a conclusion that they satisfy the test from *Hartford*. Instead, they must consider the far more amorphous and wide-reaching potential that a reasonable person "would probably have concluded, for good reason, that the insurer was liable to the plaintiff." *Demeo*, 38 Mass. App. Ct. at 956–57. In all but the most frivolous of cases, that will require settlement.

The Superior Court's application of *Demeo* is particularly problematic where, as here, the insurer relies on the good-faith assessment by competent counsel. As the Superior Court recognized, litigation inherently involves assessment of risk, and jury trials in particular can be unpredictable. Add.129. All the more reason, then, that an insurer's reliance on a good-faith assessment of risk by counsel should not generate liability under Chapter 176D. Under the *Hartford* standard, an insurer can rely on counsel's assessment to determine whether "no reasonable insurer" would refuse to settle under the circumstances. *See* Add.131. The *Demeo* standard, by contrast, creates far more uncertainty—and far more settlement pressure. So long as a court might find some fault with counsel's *ex post* assessment of a case, then an insurer faces little choice but to settle. That scheme is at odds with Chapter 176D, which requires insurers to settle once "liability has become reasonably clear"—not once an insured faces suit.

In short, the *Demeo* standard puts insurers in a bind that the statute does not require. Only this Court can resolve this tension and provide much-needed guidance regarding the scope of Chapter 176D.

## II. The Superior Court's willfulness finding is at odds with any reasonable understanding of that term.

Chapter 93A "ties liability for multiple damages to the degree of the defendant's culpability by creating two classes of defendants." *H1 Lincoln, Inc. v. S. Washington St., LLC*, 489 Mass. 1, 26 n.17 (2022). Only those defendants "who have committed 'willful or knowing' violations" of the statute are liable for multiple damages. *Id.* (citation omitted); *see id.* at 18-19 (defendant's "scheme of commercial extortion" was sufficient to establish a willful and knowing violation of G.L. c. 93A, § 11). And to be "[w]illful or knowing," conduct must be "intentionally gainful, or demonstrate[] a willful recklessness or conscious, knowing disregard for its likely results." *Rass Corp. v. Travelers Cos*., 90 Mass. App. Ct. 643, 657 (2016) (citation omitted). Absent that level of culpability in the c. 93A context, multiple damages are off the table. *See H1 Lincoln*, 489 Mass. at 26 n.17.

The Superior Court's decision flouts this standard. In particular, the court concluded that the question of willfulness "does not depend on trial counsel's assessment of the potential jury verdict." Add.129. But "the reasonableness of an insurer's response is to be considered in light of the situation as a whole." *Bobick*, 439 Mass. at 661–62. And when evaluating "the situation as a whole," there is no reasoned

basis for disregarding the assessment of undisputedly competent counsel with extensive experience in the relevant area of law and a nuanced understanding of the facts of the case. *See Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 232 n.6 (2011) (reliance on the "good faith evaluation of counsel . . . is some evidence of [the insurer's] good faith"). As this Court has explained, "[a] plausible, reasoned legal position that may ultimately turn out to be mistaken . . . is outside the scope of the punitive aspects of the combined application of [G.L.] c. 93A and c. 176D." *McGilloway v. Safety Ins. Co.*, 488 Mass. 610, 618 (2021) (quoting *Guity*, 36 Mass. App. Ct. at 343). And advice of counsel is directly relevant to whether the insurer in fact holds a "plausible, reasoned legal position." *See id.*

It is of course true, as the Superior Court observed, that jury trials are unpredictable. Add.129. But the court drew precisely the wrong conclusion from that observation. The unpredictability suggests that a court *should* consider counsel's evaluation when assessing whether it was reasonable for the insured to go to trial, rather than simply waving its hands in the face of uncertainty. The evaluation of counsel is critical to cutting through the uncertainty and assessing the reasonableness of counsel's decisions. Where there is "a legitimate difference of opinion as to the extent of [the insured's] liability" or a "good faith disagreement" as to the calculation of damages, this Court has explained that liability should not attach—let alone willfulness. *Bobick*, 439 Mass. at 660.

Here in particular, the odds of success defense counsel identified were far more

than a remote possibility of success at trial, Add.97-98, Add.123; choosing to litigate held a meaningful possibility that the insured would avoid liability outright or have its liability to Defendant significantly reduced. This case thus bears no resemblance to cases in which courts have previously found a willful violation based on flagrant, knowing violations of the statute. *See, e.g.*, *Clegg*, 424 Mass. at 417, 422 (insurer continued to litigate for more than a year "although it could not have had a reasonable belief" that it would ultimately prevail); *Chiulli v. Liberty Mut. Ins. Co.*, 97 Mass. App. Ct. 248, 259-60 (2020) (imposing liability where insurer "threaten[ed] an untenable appeal" to "exploit [plaintiff's] financial distress for its own gain"); *Hejinian v. Gen. Am. Life Ins. Co.*, No. 05-3851-BLS1, 2009 WL 981732, at *9 (Mass. Super. Jan. 13, 2009) (Gants, J.) (finding a willful or knowing violation of Chapter 176D where insurer "argued many facts that it knew to be false").

The Superior Court's decision to ignore the advice of counsel the court itself recognized as "highly capable and exceedingly experienced," *see* Add.102, was therefore error—and the error is not cabined to this case. Chapter 93A is not an outlier in tying multiple damages to knowing or willful violations. *See, e.g.*, G.L. c. 167B, § 17 (awarding treble damages where a "financial institution knowingly and willfully concluded that the consumer's account was not in error when the conclusion could not reasonably have been drawn from the evidence available to the financial institution at the time of its investigation"); G.L. c. 151B, § 9 (awarding double or treble damages for acts committed with knowledge that such acts were unlawful employment

practices); G.L. c. 214, § 3A (awarding treble damages for knowing use of another's image without consent for advertising purposes). This case therefore threatens to create increased exposure to multiple damages by broadening what conduct can be considered willful and knowing violations of law—affecting business in the c. 93A context and beyond.

Given the potentially wide-reaching implications of the Superior Court's ruling, the Court should grant direct appellate review to correct the Superior Court's interpretation and clarify that, at a minimum, good-faith reliance on advice of counsel must be a meaningful factor in evaluating whether a violation is willful or knowing.

## CONCLUSION

The Court should grant Liberty's application for direct appellate review.

Respectfully submitted,


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## CERTIFICATE OF COMPLIANCE

I, Jordan Bock, counsel for *Amici Curiae*, certify pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 17 and 20. This brief contains 3,008 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

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