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[S. Worcester County Reg'l Voc. Sch. Dist. v. Utica Mut. Ins. Co.](#)

United States District Court for the District of Massachusetts

August 13, 2010, Decided; August 13, 2010, Filed

Civil Action No. 06-40230-FDS

Reporter

2010 U.S. Dist. LEXIS 83015 *; 2010 WL 3222015

SOUTHERN WORCESTER COUNTY REGIONAL VOCATIONAL SCHOOL DISTRICT, Plaintiff, v. UTICA MUTUAL INSURANCE COMPANY, Defendant.

Prior History: [S. Worcester County Reg'l Voc. Sch. Dist. v. Utica Mut. Ins. Co., 2008 U.S. Dist. LEXIS 107280 \(D. Mass., Sept. 16, 2008\)](#)

Core Terms

bonds, insurer, unfair, embezzlement, settlement, losses, Communications, defenses, deceptive act, records, notified, accrued, rights, waive, proof of loss, penal sum, violations, documents, coverage, checks, additional information, reasonably clear, summary judgment, attorney's fees, public official, good faith, time-barred, damages, parties, reasons

Counsel: [*1] For Southern Worcester County Regional Vocational School District, Plaintiff: Jeffrey Swope, LEAD ATTORNEY, Edwards Angell Palmer & Dodge LLP, Boston, MA.

For Utica Mutual Insurance Company, Defendant: Russell F. Conn, LEAD ATTORNEY, Erin K. Higgins, Jennifer S. Newman, Conn, Kavanaugh, Rosenthal, Peisch & Ford, LLP, Boston, MA.

Judges: F. Dennis Saylor IV, United States District Judge.

Opinion by: F. Dennis Saylor IV

Opinion

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MEMORANDUM AND ORDER ON

DEFENDANT'S MOTION FOR JUDGMENT

SAYLOR, J.

This is an action seeking to recover on a series of public official bonds. Plaintiff Southern Worcester County Regional Vocational School District contends that defendant Utica Mutual Insurance Company failed to honor a series of public official bonds in the wake of a massive embezzlement by a school district employee. The District brought claims for breach of contract and unfair and deceptive acts and practices in violation of [Mass. Gen. Laws ch. 93A, § 11](#) and [Mass. Gen. Laws ch. 176D, § 3](#).

The claim for breach of contract was resolved by the Court in favor of the District on summary judgment. The claim under Chapter 93A was tried to the Court in a bench trial on October 14, 2009.

In connection [*2] with the Chapter 93A claim, Utica Mutual filed a motion pursuant to [Federal Rule of Civil Procedure 52\(c\)](#) for judgment on partial findings on the grounds that (1) Utica Mutual has paid the District its entire damages on the contract claim, which should therefore be dismissed; (2) the District's claims under Chapter 93A are time-barred; and (3) the District's failure to offer expert testimony in support of its Chapter 93A claim precludes recovery.

As to the first point, it appears undisputed that the contract damages have indeed been paid in full without statutory interest. Count 1 therefore appears to have been rendered moot and will be dismissed. The second point, concerning the statute of limitations, is addressed below in the body of this memorandum.

As to the third point, Utica Mutual contends that expert testimony was essential to prove a violation of insurance industry customs and standards. The Court disagrees.

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Expert testimony may be necessary under some circumstances to establish that an insurer has breached a relevant duty or standard of care or to help determine whether an insurer acted in good faith. See, e.g., [Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 837 \(1st Cir. 1990\)](#); [*3] [Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 119-20, 628 N.E.2d 14 \(1994\)](#). Here, however, the Court does not find expert testimony to be required to resolve the issues presented in this matter, which are relatively simple and straightforward. To that extent, therefore, the motion for judgment will be denied.

For the reasons that follow, the Court finds that Utica Mutual violated Mass. Gen. Laws ch. 93A, and will award the District its attorneys' fees and costs.

I. FINDINGS OF FACT

A. The District and Paul Blanchette

1. Southern Worcester County Regional Vocational School District (the "District") is a regional vocational district serving several Massachusetts towns. (Revised Local Rule 16.5(d) Joint Pretrial Memorandum ("RJPM") ¶ 1).

2. Paul Blanchette, an accountant, was hired by the District in March 1976 as its Business Manager. (*Id.* ¶ 2).

3. As of 1990, Blanchette was the Assistant Superintendent of Business for the District.

4. In August 1990, the Treasurer of the District, Robert Patrowicz, died. On August 20, the School Committee voted the following, as reflected in the minutes of the meeting:

APPOINTMENT OF TREASURER—As requested by the Chairman,
* * *

A MOTION was made by Robert [*4] H. Hill that the Treasurer's position be eliminated and that the duties and responsibilities under the position of Treasurer be incorporated with the duties of the Assistant Superintendent of Business and further that a one-time \$2,000 increase in salary be added for these duties. Seconded by Dr. Rene J. Hamel.

After discussion regarding combining the two positions, and a brief explanation of the procedures followed within his office, it was

VOTED: For: 5 Opposed: 2

(*Id.* ¶ 3).

5. Blanchette continued to serve as Assistant Superintendent of Business after the vote. He also performed the duties that were previously performed by Patrowicz. Those duties included signing notes for loans, transferring funds among accounts, signing checks, reconciling bank statements, and otherwise authorizing, recording, and verifying the financial transactions of the District.

B. The Public Official Bonds

6. Utica Mutual Insurance Company is an insurance company duly licensed to operate in Massachusetts, with a principal place of business in New Hartford, New York. (Complaint ¶ 3; Answer ¶ 3).

7. On August 25, 1992, an agent for Utica Mutual, G.M. Abodeely, received an application for issuance of a public official's [*5] bond in favor of the District in the penal sum of \$150,000 covering the performance of Blanchette as Treasurer of the District. (RJPM ¶ 5).

8. The application indicated that Blanchette had been appointed to the position of Treasurer on August 18, 1990, that the District's accounts were examined on an annual basis, and that the accounts recently had been examined and were in order. (Ex. 2).

9. On August 27, 1992, Utica Mutual's agent issued Public Official Bond No. SU1559050 to the District. The bond was in the penal sum of \$150,000 for the term beginning August 18, 1992, and ending August 18, 1993. (RJPM ¶ 6; Ex. 1).

10. The bond stated that Utica (the surety) and Blanchette (the principal) jointly and severally bound themselves to the District (the obligee) to pay the penal sum of \$150,000 if the principal failed to "well and truly perform all the duties of his said office or position, and account for all funds coming into his hands by virtue of his said office or position as required by law." (Ex. 1). The bond also specifically stated that Blanchette was "duly elected or appointed to the office or position of 'Treasurer of Southern Worc. County Reg. Voc. School' for the term beginning [*6] 'August 18, 1992' and ending 'August 18, 1993.'" (*Id.*).

11. Utica Mutual also issued bonds to the District

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for the years 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, and 1999-2000. (*Id.*). All of the bonds were identical in format and language to the first, except that each specified a distinct term for which Blanchette was appointed to the office of Treasurer. (*Id.*). All of the bonds were labeled with the same bond number, Public Official Bond No. SU1559050. (*Id.*).

12. The District paid a \$525 premium to Utica Mutual in each year from 1992 to 1999.

C. Blanchette's Embezzlement

13. Beginning at least as early as August 1990, and until his resignation in January 2000, Blanchette embezzled more than \$5 million from the District. (RJPM ¶ 14). He wrote checks to himself from District bank accounts, which he signed as Treasurer of the District. To conceal these losses and replenish the accounts, Blanchette took out various loans in the name of the District. He also forged annual audit reports that appeared to be from an independent auditor, and submitted those reports to federal agencies from which the District received funding and to banks from which it received loans. Blanchette [*7] also submitted false monthly financial statements to the School Committee.

14. On January 15, 2000, the District was put on notice of facts suggesting that Blanchette had embezzled funds from its accounts. (*Id.* ¶ 8).

15. On January 26, 2000, Blanchette resigned from his position with the District. (*Id.* ¶ 9).

16. On September 10, 2001, Blanchette pleaded guilty in the United States District Court to embezzlement charges. He was eventually sentenced to prison. (*Id.* ¶ 14).

D. The District's Notice to Utica Mutual and the Accounting Investigations

17. On February 15, 2000, the District notified Utica Mutual of its intent to submit a claim under the bonds. It notified Utica Mutual of Blanchette's resignation and of the fact that Blanchette had embezzled funds from the District during the period covered by the bonds Utica Mutual had issued to the District. (*Id.* ¶ 10).

18. The District also notified Utica Mutual that it had retained an outside auditing firm, Melanson Heath & Company, P.C., to conduct an investigation of the losses that it had incurred from the embezzlement. It also notified Utica Mutual that the Worcester County District Attorney's Office was conducting an investigation into the [*8] embezzlement. (*Id.*).

19. Melanson Heath issued a report to the District, dated March 30, 2000, that concluded that the losses the District incurred from Blanchette's embezzlement exceeded \$150,000 in each of the eight years covered by the Utica Mutual bonds. (Ex. 3).

20. By letter dated April 18, 2000, Utica Mutual acknowledged receipt of the District's February 15, 2000 notice of claim, and notified the District that Utica Mutual would conduct its own investigation pursuant to a reservation of rights. (RJPM ¶ 11; Ex. 4).

21. On January 17, 2001, the District forwarded Utica Mutual a copy of the March 30 report prepared by Melanson Heath. (RJPM ¶ 12).

22. Utica Mutual hired the accounting firm of Magnan Graizzaro & Associates to investigate the claim.

23. On April 6, 2001, Magnan Graizzaro issued a report to Utica Mutual of its investigation. The Magnan Graizzaro report confirmed that Blanchette had embezzled from the District more than \$150,000 in each of the periods 1995-1996, 1996-1997, 1997-1998, 1998-1999, and 1999-2000. (*Id.* ¶ 13; Ex. 5).

24. The Magnan Graizzaro report stated that it was unable to confirm the amounts that Blanchette embezzled in each of the bond periods 1992-1993, [*9] 1993-1994, and 1994-1995. (Ex. 5). The reason given was that the District's accounting firm, Melanson Heath, had, prior to Magnan Graizzaro's examination, surrendered to law enforcement officials the original records that showed the District's losses for those years. (*Id.*).

25. In its April 6, 2001 report, Magnan Graizzaro stated that it left the amount of the District's losses in those three bond years "for your [i.e., Utica Mutual's] determination." (*Id.*).

E. Communications in October 2001

26. There is no evidence of any communications between the District and Utica Mutual from January

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17, 2001, to October 2, 2001.

27. On October 2, 2001, the District's counsel sent a letter to James Donovan, a Senior Claims Specialist at Utica Mutual. (Ex. 6).

28. The October 2 letter requested payment of \$150,000 on each of the eight bonds Utica Mutual had issued to the District, or \$1.2 million. (RJPM ¶ 15; Ex. 6).

29. The October 2 letter stated that the District had not "received any indication" whether Utica Mutual took the position that it owed the District a single bond payment of \$150,000, or multiple bond payments of \$150,000 each. (Ex. 6; Tr. 41).

30. The October 2 letter requested a "[*10] explanation" of Utica Mutual's position if the insurer denied that it owed the District multiple bond payments. (Ex. 6; Tr. 42).

31. The October 2 letter asserted that it would be a violation of Mass. Gen. Laws chs. 93A and 176D for Utica Mutual to deny that it owed the District multiple bond payments. (Ex. 6; Tr. 42).

32. The October 2 letter stated that even if Utica Mutual did not agree that it owed the District multiple bond payments, Utica Mutual should pay the District the amount that it did agree that it owed the District. (Ex. 6; Tr. 42).

33. In response to the October 2 letter, Donovan consulted with his supervisor, Edith Schultz, and his home office supervisor, Jim Galpin, concerning the amount to be paid to the District on the bonds. (Tr. 33, 36-37).

34. Galpin authorized Donovan to pay the District a "single limit" of \$150,000. (Tr. 38).

35. On October 18, 2001, Donovan sent a letter to the District's counsel acknowledging that Utica Mutual was liable to the District, but that liability was limited to a single payment of \$150,000. (RJPM ¶ 16; Ex. 7; Tr. 46).

36. In the October 18 letter, Donovan did not reserve any rights on behalf of Utica Mutual not to pay the amount it agreed [*11] it owed to the District. (Tr. 49).

37. The only explanation in the October 18 letter as to Utica Mutual's position was that "[t]he actions by our principal [i.e., Blanchette] constitute a single claim, which occurred over a continuous period of time." (Ex. 7; Tr. 46).

38. With the October 18 letter, Donovan enclosed a proof of loss form. (RJPM ¶ 16; Ex. 7; Tr. 47).

39. The proof of loss form stated: "The Insured

agrees by way of compromise to accept the sum of *in full payment, satisfaction and settlement of all claims and demands against The Company under the **above numbered policy**, arising from or connected with such loss or damage to property described above under the above numbered policy.*" (Ex. 7 (italics in original, bolding added)).

40. The policy number at the top of the proof of loss form that Mr. Donovan enclosed with his October 18, 2001 letter was 1559050. (*Id.*).

41. Each of the eight bonds issued to the District by Utica Mutual were labeled with the same bond number, 1559050. (RJPM ¶ 7; Ex. 1; Tr. 74, 75).

42. Donovan handwrote the number \$150,000 on the form, and indicated with an "X" that Donovan wished the District to execute the subrogation agreement contained in the form. [*12] (Tr. 70-71).

43. It was reasonable for the District to conclude, based on the letter and proof of loss form, and the fact that the proof of loss form referred to a policy number that was applicable to all eight bonds, that it was Utica Mutual's position that it would only pay the District the \$150,000 that it admitted it owed on the condition that the District waive its rights to assert its claim that it was entitled to recover additional amounts on the multiple bonds that Utica Mutual had issued to the District.

44. The District did not submit an executed proof of loss form to Utica Mutual as requested.

F. Communications in May 2002

45. There is no evidence of any communications between the District and Utica Mutual from October 18, 2001, to May 17, 2002.

46. On May 17, 2002, the District's counsel sent a further letter to Utica Mutual. The letter characterized the proof of loss form as requiring it to "release Utica from all claims arising under the bonds before Utica will pay the District the \$150,000 that Utica acknowledges the District is owed." It again raised the issue of a potential violation of Mass. Gen. Laws ch. 93A and ch. 176D, and demanded that Utica Mutual make payment of [*13] \$150,000 within thirty days. (RJPM ¶ 17; Ex. 8; Tr. 50).

47. Utica Mutual did not respond in writing to the May 17 letter alleging that it was improperly conditioning payment of an admitted liability on the District waiving its rights to claim additional

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payments.

48. Donovan testified that he "believe[d]" that he spoke to the District's counsel by telephone and told her that she was not correct in asserting that Utica Mutual would require the District to waive its rights to seek additional payments if it accepted a payment of a single bond amount from Utica Mutual. Donovan could not, however, testify that he was certain he had done so, and could not recall that he had. (Tr. 49-51, 75, 76).

49. Donovan did not create any written memorialization of any such telephone conversation. (Tr. 76).

G. Communications in December 2002

50. At some point, Utica Mutual referred the District's claim to Richard Wholley as outside counsel. (Tr. 52, 55).

51. On December 20, 2002, Wholley sent Anne Robbins, counsel for the District, a letter that stated that "we can work out language with respect to the \$150,000 claim under the bond *that should be paid at this time*. I am sure we can work out agreeable language [*14] with respect to that amount and get that claim resolved." (Ex. 9 (italics added)).

52. The letter also confirmed that Robbins was on trial, and that she would contact Wholley at the conclusion of the trial.

H. Communications in December 2003 and January 2004

53. There is no evidence of any communications between the District and Utica Mutual from December 20, 2002, to December 2003.

54. In December 2003, counsel for the District sent Wholley a draft demand letter pursuant to Mass. Gen. Laws ch. 93A. (See Ex. 10). The draft demand letter is not, however, part of the record.

55. On January 20, 2004, David J. Daly, new counsel for Utica Mutual, wrote to Jeffrey Swope, new counsel for the District. (*Id.*).

56. The January 20 letter from Daly stated that "we are concerned that Utica's position regarding the District's claim under the public official bond needs to be clarified. . . . Utica is willing to settle [the] claim for \$150,000 subject to an appropriate release." The letter also expressly stated that the offer of \$150,000 was for settlement purposes only

and Utica did not "acknowledge[] the District is owed that amount." (*Id.*).

57. In the January 20 letter, Daly stated that Utica Mutual's [*15] position was "subject to modification" once questions and issues he identified in that letter were addressed, and he asked counsel for the District to provide additional information that supported the draft Chapter 93A letter counsel for the District had sent to Wholley. (*Id.*).

58. On January 23, 2004, counsel for Utica Mutual requested certain additional information from the District. (See Ex. 11).

I. Communications in April and August 2004

59. On April 20, 2004, counsel for Utica Mutual requested certain additional documents from the District. (See *id.*).

60. By letter dated August 11, 2004, counsel for Utica Mutual again sought additional documents from the District, and stated that once he had received them, Utica Mutual "[would] be in a position to discuss resolution of this matter." (*Id.*).

J. Communications in October 2005

61. By letter dated October 21, 2005, Daly advised counsel for the District that Utica Mutual denied liability on the eight bonds above \$150,000. (Ex. 13). The letter stated that Utica Mutual "reiterates its settlement offer of \$150,000, the penal sum of the only applicable Bond, subject to reaching agreement with the District on the terms and conditions of settlement, [*16] including a release by the District of all claims related to the Bond." (*Id.*). The letter also states that the settlement offer would be open for two weeks, after which "the offer will be withdrawn and the claim denied in its entirety." (*Id.*).

62. In the October 21, 2005 letter, Utica Mutual stated it had finally concluded its investigation, and the results "fully support denial of the District's claim." (*Id.*).

63. The letter cited several reasons that Utica Mutual had not previously asserted as grounds to deny payment on all eight of the bonds. (*Id.*).

64. Utica Mutual denied liability (1) because the bond application allegedly contained intentional misrepresentations; (2) because the District had failed to provide oversight of the activities of Blanchette; and (3) because the position of Treasurer that was covered by the bonds had allegedly been abolished by the District before Utica Mutual issued bonds that covered that position. (*Id.*).

65. In his October 18, 2001 letter, Donovan had not asserted any of those reasons for denying liability, and had not reserved any rights on behalf of Utica Mutual not to pay the District amounts that Utica Mutual owed to the District. (Tr. 49).

K. Communications [*17] in 2006

66. There is no evidence of any communications between the District and Utica Mutual from October 24, 2005, to May 8, 2006.

67. By letter dated May 8, 2006, counsel for the District sent Utica Mutual a demand letter pursuant to Mass. Gen. Laws ch. 93A. (Ex. 15). The letter demanded payment totaling \$1.2 million for the embezzlement of Blanchette over the eight years covered by the eight bonds for \$150,000 each that Utica Mutual had issued to the District to cover the position of Treasurer. (*Id.*).

68. By letter dated June 5, 2006, Daly, on behalf of Utica Mutual, responded and denied liability. (Ex. 16).

L. The Litigation

69. This action was filed on September 29, 2006. (RJPM ¶ 18).

70. On September 16, 2008, this Court issued its Memorandum and Order on Cross-Motions for Summary Judgment, granting summary judgment to the District on Utica Mutual's liability on all eight bonds and denying summary judgment to Utica Mutual. (Doc. 30).

M. Developments after the Lawsuit

71. On December 29, 2008, new counsel for Utica Mutual sent to counsel for the District five separate checks, each in the amount of \$207,402.74, payable to the District. Each check represented payment of the \$150,000 penal [*18] sum of each of the five bond periods 1995-1996, 1996-1997,

1997-1998, 1998-1999, and 1999-2000, plus full statutory interest from the date (October 21, 2005) determined by this Court as the date of Utica Mutual's breach of contract. (RJPM ¶ 21; Ex. 17). The District cashed the five checks. (RJPM ¶ 21).

72. The December 29, 2008 letter transmitting the checks for the five bond periods 1995-1996, 1996-1997, 1997-1998, 1998-1999, and 1999-2000, stated that Utica Mutual required the District to submit additional information in order to recover for its losses from Blanchette's embezzlements in the 1992-1993, 1993-1994, and 1994-1995 bond years. (Ex. 17).

73. On March 5, 2009, the parties appeared before the Court for a pretrial conference.

74. At the conference, the District's counsel agreed that the issue of whether the District had losses in excess of \$150,000 on the first three bonds was "a factual issue for which the jury's determination will be necessary." (Tr., PTC at 4).

75. The Court allowed the District 45 days to locate and produce documents substantiating its losses. (Tr., PTC at 10). The Court also set a schedule for any motions *in limine* that the parties intended to file with respect [*19] to the District's ability to prove its losses under the first three bonds. (Tr., PTC at 12).

76. On April 17, 2009, the District reported to the Court that additional documents had been located at a federal archives facility in Waltham, Massachusetts. (Doc. No. 49).

77. On April 24, 2009, the parties jointly moved to postpone the motions *in limine* deadlines to allow the parties sufficient time to review and evaluate the newly-located documents. (Doc. No. 51).

78. According to the affidavit filed by Assistant United States Attorney Paul G. Levenson, the newly-located documents initially had been obtained from Fleet Bank in or about November 2000 pursuant to a federal grand jury subpoena. (Ex. 20). The subpoena had requested all records pertaining to the Fleet Bank account that Blanchette had used as the primary vehicle for his embezzlement. (*Id.*). Upon conclusion of the criminal case, all of the Fleet Bank documents were sent to the federal archives facility in Waltham for storage. (*Id.*).

79. According to the affidavit filed by Phillip Hall, Asset Forfeiture Coordinator for the Boston Field Office of the Internal Revenue Service, all of the

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records obtained from Fleet Bank were provided [*20] to the District's counsel in May 2009. (Ex. 21). These records contained photocopies of all of the checks produced by Fleet Bank for the 1992-1995 time period. (*Id.*).

80. On May 13 2009, Utica Mutual's counsel submitted the records to James DiChaira, the accountant who had, while a partner at Magnan Graizzaro in 2001, reviewed the information provided by the District concerning the embezzlement. (Ex. 19).

81. DiChaira's examination of the records indicated that the verifiable losses incurred by the District for the 1992-1993 bond year were \$12,303.40; for the 1993-1994 bond year were in excess of \$150,000; and for the 1994-1995 bond year were \$62,744.50. (*Id.*).

82. On May 19, 2009, counsel for the District advised counsel for Utica Mutual that it would be an unfair claims settlement practice to deny payment to the District of \$150,000 for each of the 1992-1993, 1993-1994, and 1994-1995 bond years based upon an assertion by Utica Mutual that the District had not supplied sufficient evidence of its losses in excess of \$150,000 in each of those years. (Ex. 18). Counsel for the District stated that Utica Mutual had not advised the District of its need for such records at the time of its examination [*21] of its losses, when the District could have taken steps to retrieve such records. (*Id.*).

83. On June 24, 2009, counsel for Utica Mutual sent to counsel for the District a check in the amount of \$216,131.50, representing payment of the \$150,000 penal sum of the bond issued for 1993-1994, plus full statutory interest from the date (October 21, 2005) determined by this Court as the date of Utica Mutual's breach of contract. (RJPM ¶ 22; Ex. 22).

84. In his June 24, 2009 letter transmitting the check, counsel for Utica Mutual acknowledged that Utica Mutual's accountant had verified the District's losses of \$12,303.40 for the 1992-1993 bond year and \$62,744.50 for the 1994-1995 bond year, and stated that Utica Mutual would pay those amounts, plus interest, to the District, but only if it accepted those partial payments "as full and final settlement of the claims against those two bonds," other than the District's Chapter 93A claims. (Ex. 22).

85. By letter dated July 1, 2009, counsel for the District notified counsel for Utica Mutual that the

District would consider it a further violation of Chapters 93A and 176D for Utica Mutual to insist that the District waive its right to seek additional [*22] amounts due it under the 1992-1993 and 1994-1995 bonds as a precondition for receiving payments on those two bonds that Utica Mutual admitted it owed the District. (Ex. 23).

86. On August 14, 2009, counsel for Utica Mutual sent to counsel for the District two separate checks, each in the amount of \$218,647.00, payable to the District. Each check represented a payment of the \$150,000 penal sum of each of the bonds issued for 1992-1993 and 1993-1994, plus full statutory interest from the date (October 21, 2005) determined by this Court as the date of Utica Mutual's breach of contract. (RJPM ¶ 23; Ex. 28).

II. CONCLUSIONS OF LAW

87. The District contends that Utica Mutual violated [Mass. Gen. Laws ch. 93A, § 11](#) in six ways:

(1) by "requiring the District to waive its rights to pursue additional recoveries" on all eight bonds in order "to receive payment of the \$150,000 that Utica Mutual admitted it owed to the District";

(2) by "first agreeing that it owed the District \$150,000, and subsequently denying that it had so agreed and asserting that it owed the District nothing";

(3) by "reversing its position on its liability to pay \$150,000 to the District in order to avoid potential liability for [*23] having violated Chapter 93A" based on its demand for a waiver;

(4) by "changing the reasons it gave the District for not paying on the bonds";

(5) by "not asserting until 2009 [*sic*] its demand for proof of the District's losses" as to certain years; and

(6) by "asserting defenses without merit" to the District's claims.

(Pl. Prop. Concl. Law ¶¶ 5, 11, 12, 13, 16, 20).

A. Principles of Law

1. Chapter 93A Generally

88. Chapter 93A creates a right of action for "unfair . . . acts or practices in the conduct of any trade or commerce" that are suffered by an entity engaged in the conduct of any trade or commerce. [Mass. Gen. Laws ch. 93A, §§ 2\(a\), 11](#).

89. To prevail on a claim under Chapter 93A, the plaintiff must prove conduct that falls "within at least the penumbra of some common-law, statutory, or other established concept or unfairness." [Lambert v. Fleet Nat'l Bank, 449 Mass. 119, 127, 865 N.E.2d 1091 \(2007\)](#) (quotation omitted).

90. "[I]t is well settled that a simple breach of contract is never enough, by itself, to constitute a violation of Chapter 93A." [Trent Partners & Assocs., Inc. v. Digital Equip. Corp., 120 F. Supp. 2d 84, 106 \(D. Mass. 1999\)](#) (citing [Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 18 \(1st Cir. 1985\)](#)); [*24] see also [Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-01, 390 N.E.2d 243 \(1979\)](#).

91. A party may be held liable under Chapter 93A for conduct that occurs during litigation even though the litigation itself asserts Chapter 93A liability based on actions that occurred before the litigation was commenced. [Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 217 F.3d 33, 41 n.5 \(1st Cir. 2000\)](#).

92. In addition to "actual damages," [Mass. Gen. Laws ch. 93A, § 11](#) provides for double or treble damages in the event of a "willful or knowing" violation of the statute.

93. [Mass. Gen. Laws ch. 93A, § 11](#) also provides for an award of "reasonable attorneys' fees and costs incurred" in litigating the action.

94. The parties do not dispute that they are "engaged in the conduct of trade or commerce" within the meaning of [Chapter 93A, § 11](#).

2. Chapter 176D

95. Mass. Gen. Laws ch. 176D prohibits certain unfair acts by insurers related to the investigation, settlement, and payment of claims. Chapter 176D does not create a private cause of action and is enforceable only by the state commissioner of insurance. See, e.g., [Metro. Prop. & Cas. Ins. Co.](#)

[v. Boston Reg'l Physical Therapy, Inc., 538 F. Supp. 2d 338, 343 \(D. Mass. 2008\)](#).

96. [*25] Claims under Chapter 93A, however, may be based on conduct that also violates Chapter 176D. [Continental Ins. Co. v. Bahnan, 216 F.3d 150, 157 \(1st Cir. 2000\)](#) ("[C]onduct that abridges [ch. 176D] may or may not abridge [ch. 93A]"); see, e.g., [Brazas Sporting Arms, Inc. v. American Empire Surplus Lines Ins. Co., 220 F.3d 1, 9 \(1st Cir. 2000\)](#); [M. DeMatteo Constr. Co. v. Century Indem. Co., 182 F. Supp. 2d 146, 162 \(D. Mass. 2001\)](#); [Kiewit Constr. Co v. Westchester Fire Ins. Co., 878 F. Supp. 298, 302 \(D. Mass. 1995\)](#).

3. Reasonable or Plausible Interpretations of Policies

97. An insurer does not violate Chapter 93A if it denies coverage, in good faith, based on a "reasonable or plausible" interpretation of a contract. See, e.g., [Peterborough Oil Co. v. Great Am. Ins. Co., 397 F. Supp. 2d 230, 244-45 \(D. Mass. 2005\)](#); [Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 343, 631 N.E.2d 75 \(1994\)](#) ("A plausible, reasoned legal position that may ultimately turn out to be mistaken — or simply . . . unsuccessful — is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D").

98. In a case involving complex issues of law or fact, "it would be grossly unfair to bring down the potent weaponry [*26] of chapter 93A upon one who may guess wrongly about what a court will ultimately do with the problem." [Waste Management v. Carver, 37 Mass. App. Ct. 694, 699-700, 642 N.E.2d 1058 \(1994\)](#) (quotation omitted).

4. Extortionate and Coercive Conduct Generally

99. As a general matter, insurers violate Chapter 93A if they engage in conduct that is extortionate, coercive, or intended to cause delay. See [Commercial Union, 217 F.3d at 40](#); [Guity, 36 Mass. App. Ct. at 344](#) ("An absence of good faith and the presence of extortionate tactics generally characterize the basis for c. 93A-176D action based on unfair claims settlement practice.").

100. A "coercive insistence" by an insurer that an insured sign an agreement not required by the terms of a contract of insurance, as a condition to the insurer complying with its contractual obligations, may constitute an unfair practice within the meaning of Chapter 93A. [Siegel v. Berkshire Life Ins. Co., 64 Mass App. Ct. 698, 702, 835 N.E.2d 288 \(2005\)](#).

101. An insurer's actions in offering shifting or inconsistent reasons for not paying a claim may constitute an unfair practice within the meaning of Chapter 93A. [Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 36 \(1st Cir. 2007\)](#); [Commercial Union, 217 F.3d at 41-43](#).

102. [*27] The possession of a plausible defense to a coverage claim does not automatically preclude a finding of Chapter 93A violation. [Commercial Union, 217 F.3d at 40-41](#). The defense, however, "must be clearly articulated and asserted in good faith." *Id.*

5. Insurer's Duty to Effectuate Prompt Settlement

103. [Mass. Gen. Laws ch. 176D, § 3\(9\)\(f\)](#), imposes on insurers a duty to "effectuate prompt, fair and equitable settlement[] of [a] claim[] in which liability has become reasonably clear."

104. Liability has become "reasonably clear" under [§ 3\(9\)\(f\)](#) when "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." [Fed. Ins. Co., 480 F.3d at 36](#) (quotation omitted).

105. The test for when liability becomes "reasonably clear" is objective, not subjective, and is based on an inquiry into the facts and applicable law. [Demeo v. State Farm Mut. Auto. Ins. Co., 38 Mass. App. Ct. 955, 956, 649 N.E.2d 803 \(1995\)](#).

106. The insurer's obligation concerning settlement is principally an obligation to act in "good faith." See [Hartford Cas., 417 Mass. at 118](#). "[A] negligent failure to settle when a reasonably prudent insurer, exercising [*28] due care, would have settled would not be enough." *Id.*

107. An absence of good faith "[can] support [] [an] unfair settlement practice determination, even in the

face of a plausible coverage position." [Fed. Ins. Co., 480 F.3d at 36](#).

108. "The test is not whether a reasonable insurer might have settled a case within the policy limits, but rather whether no reasonable insurer would have failed to settle the case within the policy limits." [Hartford Cas., 417 Mass. at 121](#).

6. Insurer's Duty to Refrain from "Low-Balling"

109. [Mass. Gen. Laws ch. 176D, § 3\(9\)\(g\)](#), prohibits insurers from "[c]ompelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in [an] action[] brought by such insureds."

110. The purpose of [§ 3\(9\)\(g\)](#) is to "penalize the practice of 'low-balling,' i.e., offering much less than a case is worth in a situation where liability is either clear or highly likely." [R.W. Granger & Sons, Inc. v. J&S Insulation, Inc., 435 Mass. 66, 77, 754 N.E.2d 668 \(2001\)](#) (quoting [Guity, 36 Mass. App. Ct. at 343](#)).

7. Insurer's Duty to Refrain from Withholding Payment to Influence Settlement

111. [Mass. Gen. Laws ch. 176D, § 3\(9\)\(m\)](#), [*29] prohibits insurers from "[f]ailing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage."

8. Insurer's Duty to Provide Reasonable Explanation

112. [Mass. Gen. Laws ch. 176D, § 3\(9\)\(n\)](#), imposes on insurers a duty "to provide promptly a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement."

113. [Section 3\(9\)\(n\)](#) does not impose "a particularly stringent" obligation on an insurer when explaining its basis for denying a claim. See [Pediatricians, Inc. v. Provident Life & Accident Ins. Co., 965 F.2d](#)

[1164, 1172 \(1st Cir. 1992\)](#) (finding straightforward, three-sentence letter to life insurance beneficiary "sufficient" in providing reasonable explanation of beneficiary's entitlement to \$100,000 of proceeds instead of \$200,000, as claimed); cf. [Whitney v. Continental Ins. Co., 595 F. Supp. 939, 947 \(D. Mass. 1984\)](#) (finding [subsection \(n\)](#) violation where defendants never explained the basis for denying coverage under plaintiff's homeowner's [*30] policy).

9. Statute of Limitations

114. Claims brought under Chapter 93A must be commenced within four years after the cause of action accrues. [Mass. Gen. Laws ch. 260, § 5A](#).

115. A cause of action under Chapter 93A generally accrues when a plaintiff knows, or reasonably should have known, of the injury attributable to defendant's conduct. See, e.g., [Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 994 \(1st Cir. 1998\)](#).

116. Under Massachusetts law, however, a claim under Chapter 93A arising out of a breach of an insurance policy that "rests on essentially the same alleged misconduct" as the breach itself does not accrue until the insurer "unequivocally and finally" rejects the plaintiff's position. [Nortek, Inc. v. Liberty Mut. Ins. Co., 65 Mass. App. Ct. 764, 770, 843 N.E.2d 706 \(2006\)](#).

B. Analysis

1. Whether Utica Mutual Committed Unfair or Deceptive Acts or Practices

117. As noted, the District notified Utica Mutual of its claim in February 2000. Utica Mutual acknowledged receipt of the notice of claim in April 2000, and notified the District that it would conduct its own investigation pursuant to a reservation of rights.

118. Under the circumstances, Utica Mutual did not violate Chapter [*31] 93A merely by conducting its own investigation before paying or settling the entire claim.

119. Under the circumstances, Utica Mutual would not have violated Chapter 93A merely by requiring

the District to provide additional proof of loss before paying or settling the entire claim.

120. As noted, Utica Mutual's investigation, which was conducted by the accounting firm of Magnan Graizzaro, was completed by April 2001. Magnan Graizzaro concluded that an embezzlement of at least \$150,000 had occurred in each of five bond years, but that the proof was insufficient as to the other three years because the evidence had been turned over to law enforcement officials.

121. No later than April 2001, the liability of Utica Mutual to pay at least \$150,000 on a single bond had become reasonably clear.

122. On October 18, 2001, Utica Mutual implicitly acknowledged to the District in writing that it owed at least \$150,000 on a single bond.

123. On December 20, 2002, Utica Mutual expressly acknowledged to the District in writing that the \$150,000 obligation "should be paid at this time."

124. If Utica Mutual needed additional information to assess the District's claims, it should have requested that information [*32] at the latest within a reasonable period after receipt of the Magnan Graizzaro report. Utica Mutual did not request any such additional information from the District until January 2004, more than two and one-half years later. By the time the request was made, it was untimely and unreasonable.

125. If Utica Mutual had any defenses to the payment of at least \$150,000 on a single bond (such as misrepresentations in the application, the failure of the District to provide oversight of the activities of Blanchette, or the abolition of the position of Treasurer) it should have raised those defenses at the latest within a reasonable period after receipt of the Magnan Graizzaro report in April 2001. Utica Mutual did not raise any such defenses until January 2004, more than two and one-half years later. By the time those defenses were raised, they were untimely and unreasonable.

126. Because it did not request any such additional information, and did not raise any such defenses to payment, and because its liability was reasonably clear, Utica Mutual should have paid the \$150,000 owed on a single bond promptly after it received the Magnan Graizzaro report in April 2001. Its failure to do so constituted [*33] an unfair or deceptive act or practice within the meaning of Chapter 93A.

127. As noted, in October 2001, Utica Mutual offered to pay the \$150,000 owed on a single bond

to the District on the condition that the District waive its rights to recover on the additional bonds. Utica Mutual did so in an effort to force a waiver of the District's remaining claims. Its effort to do so constituted an unfair or deceptive act or practice within the meaning of Chapter 93A.

128. As of at least April 2001, Utica Mutual disputed whether it owed any obligation other than a \$150,000 payment on a single bond.

129. Although Utica Mutual's position as to whether it owed an obligation as to more than one bond was incorrect as a matter of law, the taking of that position was not so unreasonable or implausible as to constitute an unfair or deceptive act or practice within the meaning of Chapter 93A.

130. Utica Mutual's explanation in April 2001 for its denial of coverage of more than one bond claim—that the actions of Blanchette gave rise to "a single claim, which occurred over a continuous period of time"—was minimal at best. Nonetheless, it served to put the District on notice of Utica Mutual's legal position. [*34] The explanation, while far from exemplary, was not so unreasonable as to constitute an unfair or deceptive act or practice within the meaning of Chapter 93A.

131. In January 2004, and for the first time, Utica Mutual asserted various defenses to the payment of any amounts on any of the bonds, including alleged misrepresentations in the application, the failure of the District to provide oversight of the activities of Blanchette, and the abolition of the position of Treasurer.

132. The Court makes no finding as to whether the substance of those defenses was so unreasonable or implausible that their mere assertion constituted an unfair or deceptive act or practice within the meaning of Mass. Gen. Laws ch. 93A.

133. However, the timing of the assertion by Utica Mutual of those defenses (more than two and one-half years after the Magnan Graizzaro investigation was complete, during which period it engaged in discussions and negotiations with the District without raising the issue)—and the shifting and inconsistent nature of its position (it had previously acknowledged liability as to \$150,000 on a single bond)—together constituted an unfair or deceptive act or practice within the meaning of [*35] Chapter 93A.

134. The District contends that Utica Mutual's motive for belatedly raising defenses in January 2004 was to attempt to avoid liability under Chapter

93A for its previous act of conditioning payment of \$150,000 on a waiver of all other claims. The Court does not find it necessary to reach that issue and accordingly makes no finding in that respect.

135. As noted, in December 2008, after the Court issued its opinion on summary judgment, Utica Mutual paid the District on five of the eight bonds. As to the other three bonds, Utica Mutual refused to pay in full without additional proof of loss.

136. Utica Mutual's assertion for the first time in December 2008 that it required additional proof of loss—more than seven years after the Magnan Graizzaro investigation was complete (during which period it engaged in discussions and negotiations with the District without raising the issue)—constituted an unfair or deceptive act or practice within the meaning of Chapter 93A.

2. Whether the Claims Are Barred by the Statute of Limitations

137. As noted, this lawsuit was filed on September 29, 2006, and thus any claim under Chapter 93A that accrued before September 29, 2002, is time-barred.

138. [*36] The Court previously found, in ruling on the parties' cross-motions for summary judgment, that "[t]he chapter 93A claim is . . . not time-barred." (Doc. 30, at 16). Upon further reflection, and because the violations of Chapter 93A are based on discrete acts that must be independently analyzed, the Court concludes that some of the claims are time-barred and others are not, as explained more fully below.

139. Utica Mutual committed two violations of Mass. Gen. Laws ch. 93A before September 29, 2002: (1) it failed to pay the District promptly at least the \$150,000 owed on a single bond and (2) it offered to pay the \$150,000 on the condition that the District waive its rights under the other bonds. The first violation occurred no later than April 2001 and the second violation occurred no later than October 2001.

140. The District's claims under Chapter 93A based on Utica Mutual's failure to pay the District promptly on a single bond accrued in April 2001. By that point, the District knew, or reasonably should have known, of the injury attributable to Utica Mutual's conduct.

141. The District's claims under Chapter 93A based on Utica Mutual's offer to pay the \$150,000 on

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condition that the [*37] District waive its rights under the other bonds accrued in October 2001. By that point, the District knew, or reasonably should have known, of the injury attributable to Utica Mutual's conduct.

142. The District's claims under Chapter 93A that accrued in April 2001 and October 2001 are time-barred, as the complaint was filed more than four years after those claims accrued.

143. It appears that any claim under Chapter 93A based on the underlying contractual dispute—that is, based on Utica Mutual's position that it owed only an obligation on a single bond, rather than all eight bonds—would not be time-barred, as Utica Mutual did not make a final and unequivocal rejection of the District's position until October 2005. However, as noted above, Utica Mutual's taking of that position was not so implausible that it violated Chapter 93A, and thus the Court does not need to reach the issue.

144. The District's remaining claims under Chapter 93A (that is, its claims based on Utica Mutual's assertion of new and inconsistent defenses for the first time in January 2004 and its demand for additional proof of loss in December 2008) were timely filed.

3. Other Issues

145. The District suffered a "loss [*38] of money or property" within the meaning of [Mass. Gen. Laws ch. 93A, § 11](#) as a result of the violations. Among other things, the District lost the use of the money to which it was entitled and was required to incur attorneys' fees and other expenses to assert its rights.

146. Utica Mutual did not commit a willful or knowing violation of Mass. Gen. Laws ch. 93A.

147. Utica Mutual has paid the District on all eight bonds, with interest. The District's actual damages caused by the violations of Chapter 93A have thus been recovered from Utica Mutual, and any additional award of actual damages would be duplicative.

148. The District is entitled to its reasonable attorneys' fees and costs incurred in litigating the Chapter 93A violations in this action.

1. The Court finds, for the reasons stated above, that defendant Utica Mutual Insurance Company violated [Mass. Gen. Laws ch. 93A, §§ 2, 11](#), and awards plaintiff Southern Worcester County Regional Vocational School District its reasonable attorneys' fees and costs incurred in litigating those violations in this action.

2. Counsel for the District is hereby directed to submit a detailed affidavit setting forth its reasonable attorneys' [*39] fees and costs within 21 days of the date of this memorandum.

3. Defendant Utica Mutual's Motion for Judgment on Partial Findings is granted as to Count 1 and denied as to Count 2 for the reasons set forth above.

So Ordered.

Dated: August 13, 2010

/s/ F. Dennis Saylor

F. Dennis Saylor IV

United States District Judge

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III. Conclusion