COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 87-2307

ALBERT LEGER, and CARLEEN LEGER, Plaintiffs	)	MEMORANDUM IN SUPPORT OF DEFENDANT, CLIFFORD BOMBARD d/b/a BOMBARD INSURANCE AGENCY'S, MOTION FOR SUMMARY JUDGMENT
v.	)	
INSURANCE COMPANY OF NORTH AMERICA, et al., Defendants	)	

I. Procedural Background

This case arises out of the denial of Plaintiffs' fire claim by his property insurer. The Plaintiffs sent a G.L. c. 93A demand on their insurer on August 28, 1987. No G.L. c. 93A letter was ever sent to the Defendant, Bombard, who was Plaintiffs' insurance agent.[1/] On December 24, 1987, Plaintiffs brought the present lawsuit alleging facts common to all counts and setting forth a series of acts and conduct carried out by "the Defendants," their property insurer and their insurance agent. The complaint culminated in four counts against the Defendant jointly, sounding in breach of contract (Count I), unfair and deceptive insurance practices (Count II), civil rights violations (Count III), and intentional infliction of emotional distress (Count IV).

In mid-1992, the co-Defendant insurer sought and was granted summary judgment on Counts I, III and IV of Plaintiff's complaint. On Count II, the G.L. c. 93A claim, the Court ruled

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1. See Affidavit of Clifford Bombard, attached hereto as Exhibit A.

that factual questions existed by "<Plaintiffs> recovery will be limited to those damages which <Plaintiffs> can prove flowed from the unfair claims settlement practices committed by <their insurer> (if any) or twenty five dollars, whichever is greater." Id. at 7.[2]

II. Argument and Authority

a. Count II sounding in a violation of G.L. c. 93A is moribund for Plaintiffs' failure to serve a demand letter

There appears to be no genuine issue of material fact that a G.L. c. 93A letter was never served upon the Defendant Bombard prior to initiation of this lawsuit, as required by G.L. c. 93A, §9(3). This failure is fatal to Plaintiffs' claims based on that statute. Spring v. Geriatric Authority of Holyoke, 395 Mass. 274, 287 (1985); Carter v. Empire Mut. Ins. Co., 6 Mass. App. Ct. 114, 129-130 (1978).

b. The Court's order granting the insurer's motion for summary judgment is the "law of the case" and forecloses Plaintiffs' claims against Bombard

Simply put, the Court's previous ruling in this case leaves no room for a claim to be maintained against the Defendant, Bombard. The Court's decision and its impact on the continued viability of claims against Bombard is discussed seriatim.

In Count I, the Court ruled that Plaintiffs' breach of contract claim was untimely since it was not commenced within

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2. A true copy of the Court's memorandum of decision and order (Welch, J.) is attached hereto as Exhibit B.

two years following the loss, as required by law. Id. at 4-6. The Plaintiffs' complaint seek recovery from Bombard for breach of that same contract. Plaintiffs' complaint, ¶¶ 7, 44. It is inconceivable that the Plaintiffs' claim against its insurer would be untimely but its claim against its agent be viable, when both claims allegedly arise from breach of the same contract subject to the same limitation of actions.

In Count III, the Court found no actionable "threats, intimidation or coercion" sufficient to make out a violation of the Massachusetts Civil Rights Act, G.L. c. 12, §11I. Their insurer's insistence that Mr. Leger submit to an examination under oath as part of its investigation of the fire was sanctioned by contract and by statute. Moreover, there is no allegation in the Plaintiffs' complaint that Bombard had anything to do with pressing for oral examination described the complaint. See Plaintiffs' complaint, ¶¶ 22-23; 27, 31.

In Count IV, the Court found the Plaintiffs' claims for intentional or negligent infliction of emotional distress devoid of triable issues. The alleged conduct was simply not heinous enough as a matter of law. Again, this conduct surrounded the demanded deposition of Mr. Leger by his insurer, and had nothing to do with Bombard.

The "law of the case" doctrine is long established in Massachusetts jurisprudence. See H.T. Lummus, The "Law of the Case" in Massachusetts, 9 B.U.L. Rev. 225 (1929). Plainly stated, application of the doctrine is a matter of practice, not jurisdiction, and dispenses with the need of considering again

what has previously been decided in the same suit. Id. The court is not required to adopt the previous judges decision, especially where the issues in the previous and the present motion differ significantly from each other. McDonough v. Marr Scaffolding Co., 412 Mass. 636, 644 (1992) (a subcontractor's summary judgment based on the statute of repose would not require a similar ruling for a manufacturer that did not come within the statute's purview).

However, in this case there is no principled distinction between an breach of a fire insurance contract claim against an insurer as opposed to a claim against an insurance agent based on that same contract. See G.L. c. 175, §99. In addition, there is not even any hint that Bombard had anything to do with the allegedly coercive conduct that forms the basis for Counts III and IV, sounding in civil rights and infliction of emotional distress claims. In any event, the allegedly coercive conduct has been ruled not to rise to the level of an actionable tort. Since there is no reasonable expectation that Plaintiffs will be able to prove the essential elements of their case, summary judgment is clearly appropriate on Plaintiffs' claims against Bombard. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

III. **Conclusion**

For all the foregoing reasons, the Defendant, Clifford Bombard d/b/a Bombard Insurance Agency, respectfully requests the Court to grant its motion for summary judgment on Plaintiffs' Counts I, II, III and IV against him.

CLIFFORD BOMBARD,
Defendant

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