

ROBINSON & COLE^{LLP}

STEPHEN J. ABARBANEL

One Boston Place
Boston, MA 02108-4404
Main (617) 557-5900
Fax (617) 557-5999
sabarbanel@rc.com
Direct (617) 557-5938

March 25, 2005

Via Certified Mail/Return Receipt Requested

M. Frederick Pritzker, Esq.
Brown Rudnick Berlack Israels, LLP
One Financial Center
Boston, MA 02111

Re: **Rhodes v. Zurich American Insurance Company, et al**
Norfolk Superior Court No. 02-01159A
Zurich Claim No. 4150000661

Dear Mr. Pritzker:

As you know, this firm represents the interests of Zurich American Insurance Company (hereafter, "Zurich") concerning *Rhodes v. Carlo Zalewski, Driver Logistics Services, Inc., Penske Truck Leasing Corp., and Building Materials Corp. of America, d/b/a GAF Materials*, Civil Action No. 02-01159A (the "Rhodes Action"). In connection therewith, on its behalf, Zurich has asked us to supplement and communicate its response to your letter of November 19, 2004, directed to both Zurich and National Union Fire Insurance Company of Pittsburg, PA ("National Union") a purported demand under M.G.L. c. 93A § 9 and 176D. Please note that this letter is limited to Zurich's response to the *Rhodes* Action and does not address National Union's position.

This letter is intended to supplement Zurich's December 17, 2004, correspondence in which Zurich denied any wrongdoing, contested the sufficiency of the purported G.L.c. 93A demand, and tendered its \$2.0 million policy limit to the plaintiffs.¹ By letter dated December 22, 2004, Zurich forwarded the payment to your attention.

G.L. c. 93A mandates that claimants "set out specifically any activities in their demand letter as to which they seek relief. Separate relief on actions not so

¹ Zurich paid its \$2.0 million policy limit in conjunction with the applicable post-judgment interest payments due under the supplementary payments provision of the Zurich policy in the amount of \$322,995.75. The payment of the policy limit and supplementary payment for post judgment interest was conveyed in Check No. 0039648725 in the amount of Two Million Three Hundred Twenty-two Thousand Nine Hundred Ninety-five Dollars and Seventy-five cents (\$2,322,995.75) issued by Gallagher Bassett Services, Inc.

BOSTI-847626-1

Law Offices

BOSTON

HARTFORD

NEW LONDON

STAMFORD

GREENWICH

NEW YORK

SARASOTA

www.rc.com

ROBINSON & COLE LLP

M. Frederick Pritzker, Esq.

March 25, 2005

Page 2

mentioned is foreclosed as a matter of law." See *Clegg v. Butler*, 424 Mass. 413, 423 (1997). A complainant must define the injury suffered and the relief demanded in a manner that provides the prospective defendant with "an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and enables him to make a reasonable tender of settlement." See *Logan v. Arbella Mutual Insurance Co.*, 1998 Mass. Super. LEXIS 94, *3 (Mass. Super. Ct. June 15, 1998), quoting *Spring v. Geriatric Auth. Of Holyoke*, 394 Mass. 274, 289 (1985); see also, *Simas v. House of Cabinets, Inc.*, 53 Mass.App.Ct. 131, 139 (2001) (holding that a demand letter must reasonably describe the unfair act or practice relied upon).

Significantly, the required specificity concerns the adequacy of the facts comprising the alleged unfairness or deception, and not the theory of recovery. See, *Piccurio v. Gaitenby*, 20 Mass.App.Ct. 286, 292 (1985) (much like the review of a complaint under Mass. R. Civ. P. 12(b)(6), the determination of whether a letter constitutes a sufficient demand turns on the adequacy of the facts, as opposed to the adequacy of the legal theory). Moreover, the specificity requirement is heightened in the context of alleged G.L. c. 93A violations pursuant to alleged unfair or deceptive insurance practices under G.L. c. 176D. The demand must not only set forth the facts comprising the alleged unfair or deceptive practices, but must also identify the specific sections of c. 176D allegedly violated thereby. See, *Entrialgo v. Twin City Dodge, Inc.*, 368 Mass. 812, 813 (1975).

Your demand letter is premised on the conclusory allegation that Zurich has failed to "effectuate prompt, fair and equitable" settlement of the *Rhodes* Action and had thereby engaged in unfair settlement practices. This hardly comports with the required specificity set forth above. Nevertheless, as Zurich does not concur with the generalized assertions contained in your November 19, 2004 letter, Zurich's response is set forth below.

Zurich contends that the facts surrounding its actions throughout the pendency of the *Rhodes* litigation evidence its good faith. The history of this claim establishes that Zurich made a prompt, fair and equitable settlement offer once liability became reasonably clear. As you are aware, liability in this context encompasses both fault and damages. See generally, *Clegg v. Butler*, 424 Mass. 413, 421 (1997). The court applies an objective test examining "whether under the circumstances, and in light of the complainants' demands, the offer is reasonable." See, *Bobick v. United States Fidelity Guaranty Trust*, 439 Mass. 652, 659 (2003) citing *Clegg*, 424 Mass. at 420. The court analyzes the reasonableness of an insurer's response in light of the whole



ROBINSON & COLE^{LLP}

M. Frederick Pritzker, Esq.

March 25, 2005

Page 3

situation. *See, Bobick*, 439 Mass. at 661-662. Probable fault is not sufficient to satisfy the "reasonably clear" standard. *Id.* at 660.

Your letter suggests that Zurich failed to respond to plaintiffs' settlement demand and failed to investigate or conduct discovery into this matter. Contrary to these assertions, Zurich conducted a full investigation into this claim and handled it in a thorough, prompt and efficient manner. As you know, Zurich launched a comprehensive investigation, retained a host of experts to assess and evaluate the respective claims of plaintiffs, and responded promptly to correspondence and inquiries from your office. Any assertions to the contrary are unsustainable. *See generally, Doe v. Liberty Mutual Ins. Co.*, 423 Mass. 366, 371 (1996)(holding that a six-month delay was reasonable in the absence of bad faith or ulterior motives).

As evidence of Zurich's thorough and prompt action we note the following: The *Rhodes* Action was filed on July 12, 2002. In August 2002, Zurich retained coverage counsel to evaluate the named insured and purported additional insureds' competing claims for coverage. Defense counsel, appointed by Zurich subject to a complete reservation of rights, expeditiously obtained the State Police Report along with photographs of the accident and interview transcripts of the witnesses. Additionally, Zurich retained an accident reconstruction expert.

It was not until August 2003 that Zurich received an initial demand from plaintiffs accompanied by plaintiffs' version of a life-care plan. On or about September 2003, Zurich authorized the retention of a vocational expert and life-care planner, Dr. Jane Mattson. Dr. Mattson met with Mrs. Rhodes to assess her current and future needs and to formulate a comprehensive report. At all times Zurich remained open to, and actively sought the opportunity to, mediate this case. In an effort to reasonably resolve this matter and to accommodate plaintiffs' sensitivities, Zurich did not proceed with plaintiffs' depositions until it became clear that the case would not resolve.

During this time period, Zurich was also investigating the potential liability of the Town of Medway along with the failure of Jerry Macmillan's Professional Tree Service, Inc., to place warning signs for motorists. Another avenue of exploration was the extent to which the alleged braking defect in the truck driven by Mr. Zalewski may have contributed to the accident. Considering the myriad of actors, claims, theories of liabilities and the serious and complex nature of the *Rhodes* action, Zurich's response in light of the situation as a whole was fair, reasonable, and prompt.



ROBINSON & COLE^{LLP}

M. Frederick Pritzker, Esq.

March 25, 2005

Page 4

By December 2003, Zurich was prepared to tender its policy limit. This information was provided to National Union in December 2003 and to plaintiffs, at the latest, by March 31, 2004 when counsel for GAF conveyed Zurich's tender of its policy to plaintiffs. Zurich's previous tender of its policy to National Union had been rejected by that insurer.

We trust that the outline of the chronology of events from the initiation of the suit to the tender of the Zurich policy evidences Zurich's good faith handling of the *Rhodes* Action.

Zurich expressly reserves any and all of its rights, defenses, privileges, and claims as provided by applicable law, in equity, and by the terms and conditions of its policy. Such reservation includes, but shall not be limited to, the right to contest the sufficiency of your November 19, 2004 letter as a demand in compliance with the requirements of M.G.L. c. 93A.

Very truly yours,



Stephen J. Abarbanel

