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COPY

February 18, 2005

VIA CERTIFIED MAIL

Warren Nitti, Complex Director
Excess Specialty Claims Dept.
AIG Technical Services, Inc.
175 Water Street, 22nd Flr.
New York, NY 10038

Certified Mail No. 7160 3901 9842 5526 7757

RE: Marcia Rhodes, Harold Rhodes, Individually, Harold Rhodes on Behalf of his Minor Daughter and Next Friend, Rebecca Rhodes v. Zurich American Insurance Co. and National Union Fire Insurance Co. of Pittsburgh, PA—Demand Letter Pursuant to G.L. c. 93A, § 9

Dear Mr. Nitti:

As you are aware, this firm represents Marcia Rhodes, Harold Rhodes, individually, and Harold Rhodes on behalf of his minor daughter and next friend, Rebecca Rhodes (the "Rhodes family"). This demand letter is being sent pursuant to Massachusetts General Laws c. 93A, § 9, the Massachusetts Consumer and Business Protection Act, with respect to the unfair settlement practices of AIG Technical Services, Inc. ("AIGTS") in connection with its conduct in the administration of claims on behalf of National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") relating to the recent personal injury claim that resulted in a \$9.4 million (plus \$2.5 million prejudgment interest) jury verdict for our clients in Norfolk County, Massachusetts. Attached hereto as Exhibit A is the demand letter the Rhodes family sent to National Union, to which you have previously responded. It is expressly incorporated into this demand letter against AIGTS.

AIGTS is bound by Massachusetts General Law c. 176D, §3(9)(f), which requires insurers to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," G.L. c. 176D, and failing to do so is a violation of Chapter 93A, § 9(1). An insurer cannot avoid this statutory obligation by delegating its work. In fact, 176D applies to AIGTS directly as it acted either an adjuster or claims facilitator in the underlying personal injury action. See Miller v. Risk Management Found., 36 Mass. App. Ct. 411 (1994).

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Although AIGTS' insureds did not admit liability until the week before the Rhodes jury trial, the facts giving rise to the stipulation of liability were well known to AIGTS for more than two years. No later than August 2003, AIGTS had a detailed description of Mrs. Rhodes' injuries, her out-of-pocket expenditures, her medical bills and the cost of her life-care plan, such that her special damages were \$2,817,419.42 (which rose to \$3,201,670 by the time of trial). Therefore, with liability and damages being reasonably clear, AIGTS had a duty to "effectuate prompt, fair and equitable" settlement of the Rhodes family's claims. AIGTS' continued refusal to make any settlement offer, thereby forcing the family to litigate a matter in which damages clearly exceeded the \$2,000,000 Zurich policy limit, is a violation of Chapter 93A and is the type of settlement behavior that warrants multiple damages. See, e.g., Hopkins, 434 Mass. at 560-61 (failure to respond to demands were violation and multiple damages were warranted). Nor can AIGTS absolve itself from liability by claiming that it was precluded from making a settlement offer until Zurich tendered its policy. When liability is clear, an insurer's statutory duty is to make a prompt and fair settlement offer. See Hopkins v. Liberty Mutual Insurance Co., 434 Mass. 556, 567-568 (2001). Neither 93A nor 176D distinguishes between primary and excess insurers in defining responsible parties. An excess insurer's duty is to effect reasonable settlement within its own policy limits. Northwestern Mut. Ins. Co. v. Farmers Ins. Group, 76 Cal. App. 3d 1031, 1048 (Ct. App. Cal. 1978); Fidelity & Cas. Co. v. Cope, 444 So. 2d 1041, 1044-45 (Fla. Dist. Ct. App. 1984) (court held excess insurer owed same duty to settle as primary insurer).

In Fidelity, there was no question of liability and that the injuries sustained were likely to exceed all insurance. Accordingly, the court rejected the excess insurer's contention that "it had no opportunity to settle because, Hartford, as primary insurer was in control of [the insured's] defense." 444 So.2d at 1044-1045. The court went on to hold that not only was the excess insurer permitted to negotiate a settlement, but that it had a duty to defend the tortfeasor or attempt a settlement. Id. The court affirmed the decision that the excess insurer acted in bad faith by failing to settle a claim made against its insured. Id. at 1045-1046. The Fidelity decision is in accordance with Massachusetts law, as the court looks to the behavior of the excess insurer once it is reasonably clear that liability exceeds the coverage of the primary insurer. See Clegg v. Butler, 424 Mass. 413, 421-423, n.8 (1997). Here, as it was clear that the Rhodes' family's claims would exceed the Zurich policy by August, 2003, at the latest, a Massachusetts court will examine AIGTS's conduct from that date, at the latest.

AIGTS made no settlement offer until mediation on August 11, 2004. Furthermore, when AIGTS finally offered \$750,000 over the Zurich policy limits, the offer was so low that it could not be considered an attempt to "effectuate prompt, fair and equitable settlement" and was a violation of AIGTS' duty to do so under Massachusetts law. E.g., Clegg, 424 Mass. at 422-23 ("continued unwillingness to extend a reasonable offer of settlement foreseeably forced the claimants to litigate," thereby violating the statute). AIGTS' ultimate offer of \$1.5

million at mediation (for a total of \$3.5 million when combined with the Zurich policy limit) could not have been considered reasonable because it was barely enough to cover Mrs. Rhodes' special damages.

Note that having violated Chapter 93A "the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence . . ." G.L. c. 93A, § 9(3); Griffin v. Commercial Union Ins. Co., 1998 WL 1181744, * 15 (Mass. Super. Ct. 1998) (doubling amount of judgment awarded to plaintiff in underlying trial). Given the underlying judgment was \$9.4 million plus the 12% statutory interest that has been accruing at a rate of almost \$112,000 per month since July 12, 2002 (over \$2.6 million to date), damages could total over \$35,500,000.

While the Rhodes family is not required to include a particular settlement figure in this demand letter, the family is prepared to settle the c. 93A/176D claims against AIGTS and National Union for \$6 million, reserving all rights to pursue damages against each entity for separate and distinct violations of the statute. This settlement demand does not include settlement of the judgment (plus interest) in the underlying personal injury action. Under Chapter 93A, you have thirty (30) days in which to respond with a reasonable settlement offer or be subject to double or treble damages plus attorneys' fees. I trust that you will act accordingly.

Very truly yours,

BROWN RUDNICK BERLACK ISRAELS LLP

By: 

M. Frederick Pritzker

MFP/rsg

cc: Stephen J. Arbanel, Esq.