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September 15, 2008

VIA FIRST CLASS MAIL

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RE: Rhodes, et al v. AIG Domestic Claims, Inc., et al
Suffolk Superior Court, C.A. No. 05-1360-BLS1

Dear Counsel:

Pursuant to Superior Court Rule 9A, enclosed please find the original and one copy of Plaintiffs' *Opposition to Defendant's Motion to Amend Judgment.*

Feel free to call me if you have any questions.

Very truly yours,
BROWN RUDNICK LLP

By: _____
Daniel J. Brown

Enclosure

cc: Elizabeth Sackett, Esq. (w/ 1 copy of enclosure)
M. Frederick Pritzker, Esq.
Margaret M. Pinkham, Esq.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 05-1360-BLS1

MARCIA RHODES, HAROLD RHODES, REBECCA RHODES
Plaintiffs,
v.

AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY

Defendants.

OPPOSITION TO DEFENDANT'S MOTION TO AMEND JUDGMENT

The Rhodes family opposes AIGDC's motion to amend the judgment in this case to provide that there was no evidence that the appeal pursued by AIG lacked merit, and to amend the damage award from $448,250 to $0.

I. Lost Use of Funds Damages

After concluding that AIGDC "did precisely what Chapter 176D was intended to prevent – attempt to bully the plaintiffs into accepting an unreasonably low settlement rather than wait the roughly two years for their appeal to conclude and the judgment to be paid," Order at 60, the Court applied a "lost use of funds" calculation to reflect the fact that the Rhodes family had a legal right to the verdict with interest in 2004, and they were harmed by AIGDC's refusal to make any payment until mid-2005. The Court determined that AIGDC's unreasonable delay in making a fair post-verdict settlement offer extended over a five month period because settlement was not reached until June 2005, rather than within 30 days of the November 2004 Chapter 93A demand letter. Though the Court

found that the June 2005 offer would have been accepted in December 2004, the interest calculation did not begin in December, but instead, the Court held that settlement would have been reached in January with the first payment being made in February 2005. As such, the Court based the interest calculation on the February 2005 – June 2005 period, and awarded $448,250.[1]

"[W]hen an insurer wrongfully withholds funds from a claimant, it is depriving that claimant of the use of those funds" and such harm is compensable under Chapter 93A. Clegg v. Butler, 424 Mass. 413, 419 (1997); see Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 560 (2001) (affirming interest from the time a reasonable offer should have been made to the time of settlement); Miller v. Risk Mgmt. Found. of the Harvard Med. Inst., Inc., 36 Mass. App. Ct. 411, 420 (1994) (damages for lost use of money measured by interest).

The Rhodes family is entitled to be compensated for the lost use of the money they should have been paid, measured by statutory interest from the date that Defendant should have paid to the dates on which payment ultimately was received. See Mirageas v. Mass. Bay Trans. Auth., 391 Mass. 815, 821 (1984) (interest "is awarded to compensate for the delay in the plaintiff's obtaining his money."); Mongeon v. Arbella Ins. Co., 2004 Mass. Super. LEXIS 157, * 47 (Mass. Super. Ct. April 23, 2004) (using 12% to measure lost use damages). As of September 28, 2004, when judgment entered in the underlying case, the value of the Plaintiffs' case was crystal clear; Plaintiffs were entitled to $9.412 million, plus pre-judgment interest, less the $550,000 settlement from Professional Tree, for a total of $11,365,334. Clegg, 424 Mass. at 419. By September

[1] The Rhodes family contends that the Court should have calculated the lost use of funds in a different manner, such that the total award should be $1,068,234.

2005, the Rhodes family had been paid a total of $11,287,996, which was $77,338 less than the value of the verdict and pre-judgment interest they were entitled to on September 28, 2004. The Rhodes family also lost use of those funds post-judgment.

Plaintiffs do not claim that they lost the use of the entire verdict value and post-judgment interest on it for a year, as various installment payments were made between December 2004 – September 2005. Even so, when the verdict value is reduced by the payments received between 2004-2005, the lost use of money during the post judgment period totals $990,896. The Rhodes family's total lost use of funds, calculated as both the lost pre and post judgment interest, totals $1,068,234.

AIGDC claims that because the Rhodes family filed a "Satisfaction of Judgment" in the underlying action, they waived all right to recover post judgment interest from the insurer. AIGDC cites no law for this proposition, yet it must admit that the Rhodes family reserved all rights under c. 93A, including their claim that AIGDC acted in bad faith in pursuing the appeal and forcing them to give up post judgment interest in order to get AIGDC to pay the verdict value. Having expressly reserved all rights, and having steadfastly refused to settle the underlying claim the first three times AIGDC communicated an offer that conditioned settlement of the underlying claim on a release of liability under c. 93A, AIGDC's "waiver" argument is specious. See Rothenberg v. Boston Housing Auth., 335 Mass. 597, 600-01 (1957) (holding that creditor's filing of satisfaction of judgment did not preclude creditor from later recovering post-judgment interest).

Given the history and the express retention of the 93A claims, AIGDC's claim that it was improperly induced into a settlement is similarly hollow. As stated above, and

admitted by AIGDC in its Motion, the Rhodes Family expressly reserved the right to pursue all claims and damages caused by AIGDC's unfair settlement tactics. AIGDC clearly knows that lost use of money damages are recoverable in these claims. E.g. Clegg, 424 Mass. at 419. Therefore, no representation of foregoing any of those damages was even made for AIGDC to reasonably rely on, and even if it had, given the express retention of the claim, any such reliance would have been unreasonable. The case law cited by AIGDC defeats its own argument. See Weston Forest & Trail Assn., Inc. v. Fishman, 66 Mass. App. Ct. 654, 659 (2006) (for estoppel to apply, reliance must be reasonable under the circumstances and reliance was not reasonable where property owner knew of conservation restriction on property but failed to confirm that structure would comply).

II. Ample Evidence Supported Finding of AIGDC's Willful Post-Trial Violation

"The application of the good-faith test to the settlement of claims by an insurer . . . must be more exacting at the appeal stage of proceedings than before or during trial." Eric Mills Holmes, Holmes Appleman on Insurance 2d: Law of Liability Insurance, § 137.2(J), pp. 128-129, (2003) and cases cited (facts for reversal must be very strong and chances of success much greater than chances for failure for insurer to insist upon appeal). The Court found that "AIGDC's offer of $7.0 million on December 17, 2004 in response to the Plaintiff's Chapter 93A demand letter, which included Zurich's $2 million and was roughly 60% of the amount then owed under the judgment, was not only unreasonable, but insulting." Order at 59. The Court went on to conclude that "[w]hen one considers that AIGDC also required the release of the plaintiffs' claims under Chapters 93A and 176D, the offer becomes even more ridiculous." Order at 59-60.

These findings were based on testimony of AIGDC's claims adjuster, Warren Nitti, whose deposition testimony was submitted as Exhibit 87A at trial because AIGDC did not produce him to testify at trial.

Warren Nitti testified that he was aware that the $9.412 million verdict carried interest at the rate of 25%, and that he did not suggest the $7 million settlement offer that was communicated to the Rhodes family in December. Ex. 87A at 120-22. Mr. Nitti was also aware that liability had been stipulated, and if AIGDC won a new trial after appeal, by the time any new trial on damages was held, interest on the verdict would be well over 33%. Id. at 155-56. Nitti did not make the decision or any recommendation on whether to appeal. Instead, his supervisors made that decision. Id. at 157-58. Nitti testified that given his knowledge of the history of the case and the negotiations "I did not expect [the $7 million offer] to settle the case." Id. at 124. Not only did AIGDC offer $7 million to settle a case that had a value in excess of $11 million, it conditioned the settlement on the Rhodes family releasing all claims under 93A. Id. at 155.

"If an appeal following an adverse jury verdict is wholly frivolous or interposed solely for delay in an effort to wear down the plaintiff, then, in the first instance, there is objective bad faith, and in the second, there is subjective bad faith. Violations of G.L.c. 93A/176D arise in either instance." Resendes v. Boston Edison Company, 2000 WL 421004, *10 (Mass. Super. Ct. March 20, 2000); see Diamond Crystal Brands, Inc. v. Backleaf, LLC, 60 Mass. App. Ct. 502, 508 (2004) (conduct that is "extortionate in intent and effect" is knowingly unfair and deceptive as a matter of law). Expert testimony is not required to make either finding of fact.

Based on the Nitti testimony, the Court had ample evidence to find both objective and subjective bad faith on the part of AIGDC: defense counsel did not recommend an appeal; AIGDC's own adjuster didn't recommend an appeal, and AIGDC's appellate counsel thought AIGDC had only "a possibility" of "gaining a new trial on the judge's denial of the defense motion seeking [Mrs. Rhodes'] prior treatment records." Ex. 87A at 161 (quoting AIG Request for Approval to Prosecute Appeal, marked as Ex. 50 at trial).

Moreover, the likelihood of a successful appeal based on evidentiary issues is scant: "[i]t is relatively rare for evidentiary errors to result in a reversal in a civil action." Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56, 67 (2000). No expert was required on this topic as the law is so clear. The idea that not one, but two judges who denied access to Mrs. Rhodes' mental health records abused their discretion in making those rulings, and that such records would have had an effect on the verdict is so far-fetched it compels the conclusion that AIG never expected to prosecute, much less win, the appeal. A superior court judge is far more experienced in making such determinations than any expert, and the case law on this topic serves as ample authority for the Court to rely upon in making such findings of fact. See Tallent v. Liberty Mut. Ins. Co., 2005 WL 1239284, *19 (Mass. Super. Ct. April 22, 2005) (doubling underlying judgment where insurer was objectively unreasonable in offering significantly less than judgment plus interest while pursuing appeal based purely on evidentiary and contribution issues).

The fact that other c. 93A plaintiffs presented expert testimony does not equate to a requirement that all plaintiffs must do so in order to establish a statutory violation after a verdict and judgment in favor of the plaintiff. Indeed, neither of the appellate decisions

relied upon by AIGDC included such a requirement in their holdings. See DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 97-99 (1983); Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115 (1994).

AIGDC ignores the import of Palmi v. Metropolitan Property and Casualty Ins. Co., which explicitly states that expert testimony is not always needed to demonstrate how a reasonable insurer would or should act under the test set forth in Hartford. Palmi, 12 Mass. L. Rep. 464 at *12 (Mass. Super. Ct. 2000). The issue presented in Palmi was whether "ordinary jurors" could decide that an insurance contract was breached based on the evidence presented at trial, or whether they could make such a determination based only on the testimony of expert witnesses. Id. at *8. Judge Burnes held that expert testimony was required because, "[w]hat a reasonable insurer would or would not do is not something that the ordinary lay person knows." Id. at *9. She went on to note that if an insurer's conduct constitutes "gross and obvious negligence," expert testimony is not required. Id. at *9-10. In footnote 4, Judge Burnes stated, "[t]his court is not saying that an expert is always needed to explain what a reasonable insurer would do. For instance, the court could opine that much like in the professional negligence cases an insurer could commit an act so gross as to be obvious to a lay person." Id. at *12.

This Court found that AIGDC used the appeal in "an attempt to bully the plaintiffs into accepting an unreasonably low settlement rather than wait the roughly two years for their appeal to conclude . . . " and this finding has ample support in the record. As such, a violation properly found with or without any expert testimony, as any expert would be merely stating the obvious. See Diamond, 60 Mass. App. Ct. at 508. The Court's finding on AIGDC's overreaching in conditioning any settlement on a release of

the ch. 93A claim is likewise amply supported by the evidence and well-established case law.

WHEREFORE, the Plaintiffs respectfully request that the Court deny AIGDC's Motion to Alter or Amend the Judgment.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES,
And REBECCA RHODES

By their attorneys,

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Dated: September 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served a copy of the foregoing "Opposition To Defendant's Motion To Amend Judgment" upon all interested parties by mailing a copy, postage pre-paid, to:

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Dated: September 15, 2008

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