

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

CIVIL DOCKET# 05-1360-BLS1

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MARCIA RHODES, HAROLD RHODES, and REBECCA RHODES

vs.

AIG DOMESTIC CLAIMS, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA and ZURICH AMERICAN INSURANCE COMPANY,

JUDGMENT

The Court, Judge Ralph D. Gants presiding, having issued its Findings of Fact, Conclusions of Law, and Order for Judgment following a bench trial, hereby declares:

It is **ORDERED and ADJUDGED**:

1. That Zurich American Insurance Company ("Zurich") did not violate its duty as the primary insurer under G.L. c. 176D, § 3(9)(f) "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). Consequently, judgment shall enter in favor of the defendant Zurich and against the plaintiffs, with statutory costs only.
2. That National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and AIG Domestic Claims, Inc. ("AIGDC"), prior to the issuance of the final judgment in the underlying case, violated their duty as the excess insurer under G.L. c. 176D, § 3(9)(f) "to effectuate prompt ...settlements of claims in which liability has become reasonably clear," G.L. c. 176D, § 3(9)(f), but their violation did not cause the plaintiffs to suffer any actual damages.
3. That National Union and AIGDC, after the issuance of the final judgment in the underlying case, violated their duty as the excess insurer under G.L. c. 176D, § 3(9)(f) "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). The actual damages caused by this violation are limited to "loss of use" damages in the amount of \$448,250.
4. The violation found in paragraph 3 *supra* was willful and knowing, and doubling the amount of actual damages is an appropriate punitive award for such violation. Therefore, National Union and AIGDC, jointly and severally, shall pay the plaintiffs \$896,500 in actual and punitive damages.
5. That, under G.L. c. 93A, § 9(4), National Union and AIGDC shall pay to the plaintiffs the reasonable attorney's fees and costs incurred in prosecuting this action against National Union and AIGDC, which total \$950,000 in attorney's fees and \$50,000 in costs, for a total of \$1,000,000.

JUDGMENT ENTERED ON DOCKET Aug 22 2008
P. PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

TRUE COPY OF JUDGMENT FILED ENTERED ON 08/22/08

Commonwealth of Massachusetts
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The Superior Court

6. That judgment shall enter in favor of the plaintiffs and against the defendants National Union and AIGDC, jointly and severally, for actual and punitive damages in the amount of \$896,500, plus attorney's fees of \$950,000 and costs of \$50,000, for a grand total of \$1,896,500.

Dated at Boston, Massachusetts this 20th of August 2008.

Michael Joseph Donovan,
Clerk of the Court

BY: Clare A. Walsh
Assistant Clerk

Form of Judgment Approved:

Ralph D. Gants
Ralph D. Gants
Associate Justice, Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 05-1360-BLS1

MARCIA RHODES, HAROLD RHODES, and REBECCA RHODES,
Plaintiffs

vs.

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

Notice sent
8/21/2008
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M.M.P.
D.J.B.
B.R.B.I
M.E.C.
B.P.Mc.
Z. MC.
S.J.A.
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R. & C.

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**MEMORANDUM AND ORDER ON PLAINTIFFS' APPLICATION FOR ATTORNEY'S
FEES AND COSTS**

On June 3, 2008, this Court found that the defendant National Union Fire Insurance Company of Pittsburgh, PA and AIG Domestic Claims, Inc. (collectively, "AIGDC"), after the issuance of the final judgment in the underlying case, violated their duty as the excess insurer under G.L. c. 176D, § 3(9)(f) "to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." G.L. c. 176D, § 3(9)(f). This Court found actual damages arising from "loss of use" to be \$448,250, which it doubled to \$896,500 after finding that the violation was willful and knowing. This Court also found that, under G.L. c. 93A, § 9(4), that AIGDC must pay the plaintiffs (Marcia, Harold, and Rebecca Rhodes, collectively "the Rhodes") the reasonable attorney's fees and costs incurred in prosecuting this action. The plaintiffs have applied for attorney's fees in the amount of \$2,635,592.50, plus another \$71,850 for the fees incurred in preparing the fee application, and \$190,090.69 in costs, for a total of \$2,897,533.19. AIGDC opposes the application, contending that it far exceeds what may fairly be deemed reasonable attorney's fees and costs. After hearing, having considered the fee application and the opposition, and the applicable law, this Court hereby finds that the reasonable attorney's fees and costs that the plaintiffs incurred in prevailing on their claim under Chapters

176D and 93A total \$ 950,000 in attorney's fees and \$50,000 in costs, for a total of \$1,000,000.

DISCUSSION

Under G.L. c. 93A, § 11, if the defendants, as here, are found to have committed unfair and deceptive acts in violation of G.L. c. 93A, § 2, the plaintiff "shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action." G.L. c. 93A, § 11. "While the amount of a reasonable attorney's fee is largely discretionary, the judge ... should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." Linthicum v. Archambault, 379 Mass. 381,388-389 (1979). See also Heller v. Silverbranch Construction Corp., 376 Mass. 621, 628-629 (1978). "No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required." Berman v. Linnane, 434 Mass. 301, 303 (2001). In making its determination, the Court is not required to review each individual item in the legal bill, but can consider the bill as a whole. Id. In determining what constitutes an award of reasonable attorney's fees and costs, this Court has considered each of the so-called Linthicum factors set forth above, and will address each of them.

The Nature of the Case and the Issues Presented

In determining the award of reasonable attorney's fees and costs in this case, this Court is mindful that the Rhodes prevailed only against the excess insurer – AIGDC, not against the primary insurer – defendant Zurich American Insurance Company ("Zurich"), and prevailed against AIGDC only as to its failure to provide a fair and prompt offer of settlement after trial, not before trial. Therefore, while the plaintiffs ultimately prevailed against AIDGC, they

prevailed only in part, and while they were awarded a substantial sum in damages (nearly \$900,000), that sum was only a fraction of the damages they sought at trial (roughly \$72 million). Since the plaintiffs are entitled to attorney's fees and costs only as to that part of their Chapter 176D/93A claim on which they prevailed, this Court, in awarding attorney's fees and costs, shall seek to determine the amount of such fees and costs that they reasonably would have incurred had they brought only the claim against AIGDC on which they ultimately prevailed.

Had they brought only the prevailing claim, the scope of legal and factual issues would have been narrower than it was, but not as narrow as AIGDC contends. As the Court found in its Findings of Fact, Conclusions of Law, and Order, to prove that AIGDC's \$7.0 million post-trial settlement offer (made on December 17, 2004 and repeated in writing on March 18, 2005) was unreasonably low and constituted a willful and knowing violation of G.L. c. 176D, § 3(9)(g), the Rhodes needed to answer the following questions to evaluate the fairness of that offer:

- What is the likelihood that the appeal will succeed?
- If it does succeed, is the result likely to be a new trial, dismissal of the claim, or a reduction in the amount of the judgment?
- If the appeal obtains a new trial, what is the likelihood that the defendant will prevail at this new trial? If the plaintiff were to prevail, what is the likelihood that the damages found by the jury will differ greatly from those found by the jury at the first trial?

Findings of Fact, Conclusions of Law, and Order at 57-58. The factual issue regarding the valuation of the case after trial would have remained, especially since one of the grounds for appeal was the trial court's denial of the defendants' motion for remittitur, and the valuation of the case before trial would have been highly relevant to that valuation. Therefore, even if the claim had focused only on AIGDC's post-verdict offer, it would have been reasonable for the

Rhodes' attorneys -- Brown Rudnick Berlack Israels LLP ("Brown Rudnick") -- to obtain discovery from both Zurich and AIGDC of all their non-privileged work product regarding the claim and to depose their various claim representatives to determine their valuation of the case. Consequently, the scope of discovery would not have been substantially narrowed and many of the legal issues concerning discovery that were addressed in this litigation, including the existence in Massachusetts of the joint defense privilege, would have needed to be confronted. See Hanover Insurance Company v. Sutton, 46 Mass. App. Ct. 153, 177 (1999) (when common law and Chapter 93 claims are inherently interwoven, the Court need not attempt to apportion the legal effort between the two claims).

While the valuation of the case would still have needed to be fully litigated, some of the other difficult legal and factual issues in this case would have been irrelevant or, at least, less relevant. All of the factual and legal issues that focused only on the timeliness and reasonableness of Zurich's settlement offer would have gone away, as would the factual and legal issues concerning the timeliness and reasonableness of AIGDC's pre-verdict settlement offers. The efforts to prove actual loss would have been far simpler, because the loss would have fallen into the traditionally recognized "loss of use" damages and the Rhodes would not have needed to develop the far more difficult proof needed to establish other types of damages, including emotional distress damages. Moreover, the important question of causation would not have needed to have been addressed if the focus were solely on the post-verdict offer, because the Rhodes ultimately did accept a later, more reasonable post-verdict offer. To be sure, difficult legal and factual issues would have remained if the case had focused only on AIGDC's post-verdict settlement conduct, but not nearly as many as were addressed when the focus was also on Zurich's and AIGDC's pre-verdict settlement conduct. The narrower scope would have

substantially reduced the overall cost of reasonably prosecuting this action.

The Time and Labor Required

This Court credits the affidavits of the Brown Rudnick attorneys that the work they said was performed was indeed performed, and performed in the time period they said it was. This Court also finds that the amount of work they needed to perform was increased by the various legal battles they needed to fight with AIGDC, including various battles regarding the scope of discovery. This Court, however, also finds that much, indeed most, of the time and labor expended would not have been expended had the case focused only on AIGDC's post-verdict settlement conduct, rather than on Zurich's and AIGDC's pre-verdict settlement conduct. Moreover, this Court finds that Brown Rudnick, while it ably tried the case, was not experienced in cases of this nature, and spent a significant amount of time coming "up to speed" on legal issues that would have been more familiar to litigators who routinely handle such Chapter 176D cases. While its inexperience in this subject matter did not affect the ultimate work product, which was of the highest order, it did somewhat increase the amount of time and labor that yielded that work product.

The Amount of Damages Involved

The statutory directive that reasonable attorney's fees be awarded "irrespective of the amount in controversy" means that the prevailing party is entitled to reasonable attorney's fees even if the money award is purely nominal. See Raymer v. Bay State National Bank, 384 Mass. 310, 319-320 (1981) (awarding "modest attorneys' fees" in the amount of \$4,500 on money judgment of \$1). Yet, the inclusion of the amount of damages involved among the Linthicum factors indicates that what is reasonable may depend, at least in part, on the amount of damages involved and the result obtained. Linthicum v. Archambault, 379 Mass. at 388-389. As Judge

Patti Saris wrote, “While [the phrase, ‘irrespective of the amount in controversy’] means the amount in controversy is not controlling, I have never heard of determining a reasonable fee without paying some regard to what was involved. The legislature, for example, cannot be thought to have intended that, simply because a plaintiff has a legitimate, but modest, Chapter 93A claim counsel could proceed as though conducting a multimillion dollar class action.” Morse v. Mutual Federal S. & L. Ass’n of Whitman, 536 F. Supp. 1271, 1283 (D. Mass. 1982). Therefore, in determining the award of attorney’s fees and costs in this case, this Court has considered the amount that would have been reasonable had the potential damage award been treble the actual damages obtained – \$1,344,750 – which is the amount that reasonably was possible if the focus of the litigation had been limited to AIGDC’s post-verdict settlement conduct.

The Result Obtained

Since this Court is deciding the award of attorney’s fees as if the Rhodes had only brought the claim on which they prevailed, this Court must consider the result in the same context. So narrowed, the Rhodes obtained a substantial victory, not only for themselves but also for insureds similarly situated.

The Experience, Reputation, and Ability of the Attorneys

This Court finds that the experience, reputation, and ability of the Brown Rudnick attorneys and paralegals who prosecuted this action was very high. The case was very ably litigated and tried, both as to the facts and the law.

The Usual Price Charged for Similar Services by Other Attorneys in the Same Area

This Court finds the hourly rates charged by the partners, associates, and paralegals at Brown Rudnick to be in keeping with the rates charged by comparable attorneys and paralegals at

the most elite law firms in Boston, but significantly higher than the rates charged by the average large law firm in Boston and considerably higher than the rates charged by the law firms who routinely handle Chapter 176D litigation. However, this Court finds that many of those law firms who routinely handle Chapter 176D litigation on the plaintiff's side would not likely have produced the quality of legal work provided by Brown Rudnick in this case. Therefore, in considering the reasonableness of the legal fees, this Court finds that they should be reduced by roughly 20 percent to conform to the average rates charged by large, able but less elite law firms. In reaching this finding, this Court notes that the billing rates provided to the Court by Brown Rudnick were not actually charged to the Rhodes, since the case was taken on a contingency fee basis. This Court is confident that, if the Rhodes had not entered into a contingency fee agreement but had instead agreed to pay Brown Rudnick for the time expended, Brown Rudnick would have offered the Rhodes a discount that would have approximated at least 20 percent.

The Amount of Awards in Similar Cases

In considering this award, this Court has also considered the attorney's fees awards it has entered in various other cases involving large Boston law firms, including but not limited to the fee awards in Brooks Automation v. Blueshift Technologies, Inc., Suffolk Civ. No. 05-3973-BLS2 and Troy Industries, Inc. v. Samson Manufacturing Corporation, Suffolk Civ. No. 05-0146-BLS2. None of these cases involved a claim under Chapter 176D.

Synthesis

Considering all these various factors together, this Court finds that the reasonable attorney's fees and costs that should be awarded to the Rhodes for that part of their Chapter 176D/93A claim on which they prevailed total \$950,000 in attorney's fees and \$50,000 in costs, for a total of \$1,000,000. This is roughly 34.5 percent of the fees and costs sought by the

Rhodes, \$103,500 more than the actual and punitive damages they were awarded, and nearly 75 percent of the amount they would have received had they been awarded treble, rather than double, punitive damages.

ORDER

For the reasons stated above, after hearing, having considered the fee application and the opposition, and the applicable law, this Court hereby **FINDS** that the reasonable attorney's fees and costs to be awarded to the Rhodes after having prevailed on part of their Chapter 176D/93A claim total \$950,000 in attorney's fees and \$50,000 in costs, for a total of \$1,000,000.



Ralph D. Gants
Justice of the Superior Court

DATED: August 20, 2008