COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**

MARCIA RHODES,
HAROLD RHODES, INDIVIDUALLY,
HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD
AND NEXT FRIEND, 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.

CIVIL ACTION NO.

05-1360BLS

SUPPLEMENTAL ANSWER OF AIG DOMESTIC CLAIMS, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendant, AIG Domestic Claims, Inc. and National Union Fire Insurance Company of Pittsburgh, PA submits this Supplemental Answer to Plaintiffs' First Set of Interrogatories. This Supplemental Answer restates and incorporates by reference the General Objections and all of the specific objections set forth in these defendants previous Answers to Interrogatories.

INTERROGATORY NO. 5:

Identify by name, employer, address and qualifications, each person you expect to call as an expert witness at the trial of this action and for each such person:

a. State the subject matter on which such person is expected to testify;

b. State the substance of the facts and opinions to which each such person is expected to testify; and

c. Provide a summary of the grounds and the materials relied upon for each such opinion.

ANSWER TO INTERROGATORY NO. 5:

Objection and Answer. Interrogatory No. 5 seeks information about expert witnesses beyond that authorized by Mass. R. Civ. P. 26. Subject to and without waiving this objection and the General Objections incorporated herein, AIG Domestic Claims, Inc. and National Union Fire Insurance Company of Pittsburgh, PA expect to call J. Owen Todd and William T. Cormack as expert witnesses at trial. The qualifications of these witnesses are set forth through their Curricula Vitae which are submitted herewith.

J. Owen Todd, Todd & Weld LLP, 28 State Street, Boston, Massachusetts.

Mr. Todd will offer testimony concerning the respective efforts of the plaintiffs and defendants to effectuate settlement in the underlying case. Mr. Todd is a mediator, a former associate justice of the Superior Court and an attorney with more than forty years of experience. While a Superior Court judge, Mr. Todd often sat in Norfolk County Superior Court and he has tried many cases in that court. His Curriculum Vitae is attached at Tab A.

In forming the opinions he expects to present, Mr. Todd reviewed deposition and trial transcripts from the underlying case, deposition transcripts and pleadings generated in the present litigation, and documents produced by both plaintiffs and defendants in the present litigation. He intends to review additional pleading and briefs filed in this case. He has also reviewed settlement and jury verdict reports and settlement and verdict research he has compiled himself.

Mr. Todd is expected to testify as follows:

Viewing the evidence reflecting the parties' conduct in connection with the efforts to settle the underlying claim by the Rhodes family, there is substantial evidence of good faith on the part of AIGDC. Nothing indicates AIGDC was not genuinely interested in effectuating a fair and reasonable settlement. However, good faith negotiation does not always lead to a settlement. Despite the good faith efforts by all parties, many cases do not settle.

In this case, there is substantial evidence to support the conclusion that plaintiffs placed an extraordinarily high value on the case in comparison to settlements and verdicts in similar cases in Massachusetts, and Norfolk County in particular. In light of the demands presented by plaintiffs and a reasonable interpretation by AIGDC regarding what seemed to be the lowest amount plaintiffs would accept to settle the case, it was reasonable for AIGDC to believe that, even taking into consideration the prejudgment interest, a jury award likely would be less than plaintiffs what would accept to settle. In addition, the negotiation strategy employed by plaintiffs' counsel conveyed to AIGDC the impression that plaintiffs were comfortable with the risk of putting the determination of the value of the underlying case in the hands of a jury. Attorneys are ethically obligated to explain the risks of trial to their clients and, although plaintiffs' counsel refused to testify on this subject during his deposition in the present case, there is no reason to believe that Mr. Pritzker did not fully inform the Rhodes of the risks and potential rewards of placing the

valuation of their claim in the hands of a jury. In this vein, it was also reasonable for AIGDC to believe that to avoid the risk and the stress of trial, plaintiffs would accept less than the amount they expected or hoped that the jury would award. The reasonableness of AIGDC's view of the underlying case's settlement value is supported by one of plaintiffs' attorneys' statements in an article published by Massachusetts Lawyers Weekly. Based on an interview with Margaret Pinkham, the article reported that plaintiffs attorneys recognized that they and their clients "had reasons for concern" based on the subjective nature of damages for pain and suffering and loss of consortium (by far, the largest element of the plaintiffs' demands) "that juries often view with skepticism." According to Ms. Pinkham, plaintiffs' counsel's "biggest fear was the jury coming in with a $2 million verdict."

AIGDC reasonably perceived plaintiffs' settlement demands and the pattern of negotiation conducted by their counsel to reflect an unwillingness by plaintiffs to accept anything less than at least $10,000,000 to settle the case. Plaintiffs' presented their initial demand for $16.5 million in August 2003, nineteen months after Mrs. Rhodes' accident, and well over one year after plaintiffs commenced litigation. Plaintiffs were represented by savvy, experienced and, by their own description, "aggressive" lawyers who recognized the importance of not only the amount of the initial demand, but also its timing. Some cases settle well before trial and occasionally, even before discovery is complete; however, as trial approaches, counsel are afforded greater insight into both their client's and their opposition's risk tolerance and risk aversion and how they will come across to a jury. Experienced counsel generally benefit from this insight and recognize that making an early settlement demand can be perceived, correctly or incorrectly, as a willingness to accept a lesser amount to avoid litigation and trial. Though plaintiffs' counsel was retained within one month after the accident, plaintiffs counsel waited more than a year-and-a-half before making any demand.

Prior to the initial demand, which was presented in August 2003, plaintiffs had not provided defendants with medical records relating to the injuries sustained by Mrs. Rhodes. Moreover, before August 2003, Marcia Rhodes' medical treatment and rehabilitation had not reached a point from which an accurate evaluation of the extent of the need for future care and treatment costs could be adequately analyzed. Experienced counsel will not consider settlement of a personal injury case, particularly one that involves paralysis, until there is a high degree of certainty that future medical care and treatment can be accurately determined. Indeed, Chapters 176D and 93A do not require an insurer to make any offer of settlement until liability, including both the fault of the insured and the amount of the damages, becomes reasonably clear. The submission a life-care plan along with the August 2003 settlement package, indicates the recognition by the plaintiffs' own counsel that it would have been premature to consider settlement sooner.

As with most cases that fail to settle, it was not a lack of good faith on the part of either side, or a lack of litigation and settlement experience that prevented settlement in the underlying case. Rather, the parties simply had a legitimate difference of opinion as to the appropriate settlement value that was too great to bridge. There is no evidence that the parties' inability to settle the underlying case was due to anything other than a dispute about the value of the claim. In terms of what is usual and customary in settlement

negotiation, the only think remarkable about either the timing or the amounts of the settlement demands and offers was the extraordinarily high amount of the demands and the clear unwillingness to seriously compromise. According to the testimony of plaintiffs' lead counsel, Mr. Pritzker, the verdict in the underlying case was the highest verdict ever rendered in a paralysis case in Massachusetts and plaintiffs' settlement demand of $19.5 million was more than twice that amount.

In August 2003, plaintiffs made an initial settlement demand of $16.5 million. Where multiple layers of insurance are involved and it becomes clear that the primary layer is not sufficient to settle a case, the limit of liability of the primary insurer is typically tendered to the excess insurer, so the excess insurer can attempt to negotiate a settlement within its coverage. In the present case, Zurich did not tender its policy limit to AIGDC, nor did it extend an offer in response to plaintiffs' initial demand until March 31, 2004. Three months earlier, in December 2003, plaintiffs had increased their demand from $16.5 million to $19.5 million. Plaintiffs' rationale for increasing the demand was "prejudgment interest," however, it was reasonable for AIGDC to infer that plaintiffs' experienced counsel had not ignored this element of the claim in their initial demand, which was made just four months previously. AIGDC reasonably inferred that the increased demand was intended to send the signal that plaintiffs were taking a very aggressive approach toward settlement and had reason to be concerned that plaintiffs had little room to compromise.

According to the testimony of Mr. Rhodes in the present case, he and his wife decided shortly before the August 2004 mediation (on their own behalf and that of their minor daughter) that they would not accept anything less than $8 million to settle the entire underlying case. Testimony in this case by the Rhodes indicates that they never had any interest whatsoever in settling the loss of consortium claims separately and, in fact, all of plaintiffs' demands were presented as a package to settle the claims of all three plaintiffs. Therefore, AIGDC never had any opportunity to settle the claims of any of the three plaintiffs separately. Since the claims of Harold and Rebecca Rhodes cannot have settled without the claim of Marcia Rhodes settling, Harold and Rebecca Rhodes cannot complain now that AIGDC did not make reasonable offers to settle their derivative loss of consortium and loss of parental society claims.

On March 31, 2004, Zurich extended a $2 million policy limit settlement offer directly to plaintiffs on behalf of all of the direct defendants. As explained in their depositions, the AIGDC claim representatives, Warren Nitti and Nicholas Satriano, believe the negotiations could have proceeded better if Zurich had tendered its $2 million policy limits directly to AIGDC, so that it could negotiate with the plaintiffs, as opposed to unilaterally deciding to offer $2 million directly to plaintiffs in exchange for a full release of all of the defendants. As it transpired, plaintiffs' counsel testified that he viewed this initial offer as insulting and he rejected this offer without any response. This delayed the scheduling of the mediation, as did AIGDC's legitimate and appropriate request that additional discovery be completed before the mediation. This discovery included deposing all of the plaintiffs, obtaining all of the medical and mental health records, and conducting an independent medical examination of Mrs. Rhodes. This discovery was imperative to fully develop the information on which a valuation of the case depended. In

addition, it is entirely appropriate and a sound litigation practice for a defendant to take depositions to assess how plaintiffs will be perceived by a jury.

The documents in the AIGDC claim file and the testimony of AIGDC's claims representatives reflect diligent preparation for the mediation. AIGDC developed a reasonable assessment of the settlement value and a reasonable mediation strategy. Mr. Nitti, a complex claim director, prepared a detailed memorandum outlining the facts of the case and he sought settlement authority for a total settlement (including the anticipated contribution of the third party defendant, McMillan Tree Service) of $6 million. His supervisor, Tracey Kelly, reviewed the memorandum, spoke with Mr. Nitti, and developed her own assessment of the settlement value. Mr. Nitti and Ms. Kelly are both attorneys who had years of experience in private practice defending personal injury cases before they came to work for AIGDC. Mr. Nitti also represented plaintiffs in personal injury actions. At the time of the events in question, Ms. Kelly had several years of experience at AIGDC handling excess claims that involved wrongful death, paralysis and other serious injuries. She testified, based upon her experience, that she believed the case could be settled at mediation for less than $5 million, and she expected at the time of the mediation that $1 million of the settlement would be paid by the insurer for the third party defendant, McMillan Tree Service.

Both Ms. Kelly and Mr. Nitti believed that plaintiffs' counsel would recognize the opportunity to negotiate in a manner that would compel the insurer for the co-defendant, McMillan Tree Service, to offer its full policy limit. Based upon the rule of joint and several liability that applies in Massachusetts, if McMillan's insurer had not settled, McMillan could be exposed to liability for a judgment far greater than the policy limit, even if it was found to be only 1% at fault. Both Mr. Nitti and Ms. Kelly expected plaintiffs' counsel to leverage that exposure into a policy limits settlement by McMillan's insurer. Unfortunately, plaintiffs' counsel had not considered the effect of the joint and several liability rule (as he testified during his deposition). Plaintiffs agreed to accept a settlement offer of just $550,000 from McMillan's insurer and this, along with plaintiffs' extremely high valuation of the case, contributed to AIGDC's inability to effectuate settlement. However, these variables which AIGDC could not control do not cast any light on AIGDC's evaluation of the settlement value of the case prior to and through the time of the mediation, an evaluation that was well within the range of reasonableness for cases of this nature in Norfolk County Superior Court.

In considering the efforts of AIGDC to effectuate settlement with plaintiffs, one must consider plaintiffs' demands. While this is a matter of common sense, it is also a matter of common law. Both state and federal courts that have addressed an insurer's duty to effectuate settlement (under G.L. c. 176D, § 3(9)(f)) have held that the insurer's offers and negotiation are not to be assessed in a void, but rather in the context of the plaintiffs' demands and negotiation tactics. Since plaintiffs' counsel refused to testify at their deposition in the present case about their assessment of the settlement value or plaintiffs' settlement or negotiation strategy, and plaintiffs testified that they relied entirely on their counsel with regard to settlement advice, the effect of that assessment and strategy on the failure to reach a settlement cannot be determined based on direct evidence. Thus, even in retrospect, one is left with the situation that was faced by AIGDC while trying to

negotiate a settlement of the underlying case: inferring the expectations of plaintiffs through the conduct of their counsel. While the recollections of plaintiffs' counsel and Mr. Nitti are not identical with respect to the settlement negotiations, both of their memories reflect a similar progression of demands and offers. Moreover, when viewed together, they reflect the substantial, but legitimate, difference of opinion between the settlement value ascribed to the claim by plaintiffs and by AIGDC. This is the reason the case was not settled, despite the good faith negotiation by AIGDC.

When the parties engaged in mediation in August 2004, plaintiffs began by restating their $19.5 million demand. Despite plaintiffs' refusal to lower their demand, AIGDC increased defendants' offer to $2.75 million. Plaintiffs then made a demand for $15 million, PLUS an assumption by AIGDC of Mrs. Rhodes future medical expenses. (Mr. Rhodes testified that it was frustrating and time consuming to deal with Mrs. Rhodes' health insurance company and plaintiffs were concerned that the family's health insurance could be canceled.) AIGDC responded to the new demand with an offer of $3.5 million. Again, AIGDC expected that this would be in addition to the anticipated $1 million contribution from the tree service. This offer (including the anticipated $1 million from the tree service) was only $1.5 million less than what the plaintiffs' own expert has stated under oath would have been a reasonable settlement value, while while plaintiffs' $15 million, plus medical expenses demand was more than twice the amount their own expert has said was the upper range for a reasonable settlement value of the case and was more than 2 ½ times the lower end of the reasonable range. After AIGDC made the $3.5 million offer, Plaintiffs did not make any further demands at the mediation, or before trial for that matter. In fact, Harold Rhodes has testified that, after the mediation, he decided to let the jury decide the case. At no point before the trial did plaintiffs give AIGDC any indication that they would be willing to settle the case for less than $15 million, plus the assumption of the future medical expenses.

There are a number of conclusions that can be drawn from the negotiations at mediation. First, AIGDC's offers were reasonable in relation to both the plaintiffs' demand and the settlement and verdict values of similar cases in this jurisdiction. Second, plaintiffs' demands reflected very little willingness to compromise. Third, plaintiffs' negotiation strategy was interpreted by experienced negotiators at AIGDC and defense counsel as indicating that plaintiffs had an unreasonably high assessment of the underlying case's settlement value. Finally, the negotiations that took place at the mediation, i.e., AIGDC's $3.5 million offer, when viewed in conjunction with the $1 million AIGDC expected would be contributed by McMillan's insurer, was a reasonable incremental move, and reflected far more willingness to compromise than plaintiffs' exhibited in reducing their demand less than 10% from their initial demand of $16.5 million. In fact, given that plaintiffs' demand at the mediation included an assumption of the future health care costs, the reduction in the demand from the original $16.5 million demand to the last pretrial demand reflected no compromise at all. Even after it was revealed to AIGDC that plaintiffs had agreed to release McMillan Tree Service in exchange for a payment of $550,000, the sum offered by the defendants was far closer to what plaintiffs' own expert has stated was the reasonable settlement range, than plaintiffs demand. According to plaintiffs' expert, Arthur Kiriakos, the reasonable settlement range of the underlying case was $6 to $8 million.

Despite a full day of mediation, plaintiffs reduced their demand only once, to a sum that is twice the reasonable settlement range presented by plaintiffs' expert. Plaintiffs' refusal to respond to AIGDC's $3.5 million offer and their decision to stand on their $15 million demand could reasonably have been construed by Mr. Nitti to indicate that plaintiffs would not have settled even in the range plaintiffs expert opines was reasonable. While Mr. Rhodes has testified that plaintiffs would have accepted $8 million and no less to settle the claim at the mediation, this could not be discerned by AIGDC from the demands made by Plaintiffs. This could be viewed as skillful negotiating, as a party reasonably does not want his opposition to know his "bottom line." However, in this case, the plaintiffs' negotiation tactics undermined the parties' mutual goal of achieving a settlement. Moreover, even a $6 million offer, which plaintiffs' expert states was a reasonable, final settlement amount, would not have been enough for plaintiffs to effectuate settlement.

Further reflecting AIGDC's interest in effectuating settlement, when the parties convened to empanel a jury, Mr. Nitti extended an offer of $4 million to plaintiffs. After plaintiffs responded with a demand of $12.8 million, Mr. Nitti extended an offer of $4.5 million. These offers were in addition to the $550,000 the tree service had already agreed to pay Plaintiffs. No further demand was ever presented by plaintiffs, though according to Mr. Nitti, Mr. Pritzker told him that he would recommend a settlement of $11.6 million to his clients. Despite the absence of a further demand, after the presentation of evidence was completed, Mr. Nitti made a further offer of $6 million. Viewing this offer in conjunction with the $550,000 paid by the tree service, the total amount of $6,550,000 was well within the reasonable settlement range presented by plaintiffs' own expert. These efforts clearly demonstrate a diligent effort on the part of AIGDC to effectuate settlement.

Although the law is clear that the ultimate verdict is not relevant to the determination of whether an insurer made a reasonable offer of settlement, the fact that the jury verdict of $9,412,000 was highest verdict in Massachusetts in 2004 demonstrates that it was significantly more than what reasonably could have been expected by AIGDC. AIGDC considered jury verdict research, its experience in thousands of similar cases and the demographics and jury verdicts in Norfolk County Superior Court, as part of its effort to effectuate a fair and reasonable settlement. Independent research into jury verdicts and settlement in paralysis cases and cases involving an amount of special damages similar to that presented in the underlying case demonstrates that AIGDC's offers were reasonable, particularly in light of the demands and negotiating tactics employed by plaintiffs. Moreover, while the jury's award of $7,412,000 for Mrs. Rhodes was itself extremely high, the loss of consortium awards of $1.5 million to Harold Rhodes and $500,000 to Rebecca Rhodes were far in excess of the reasonably anticipated range of the exposure.

Following the jury verdict, counsel for the underlying defendants, AIGDC's insureds, preserved their appellate rights through the filing of post-trial motions and, after judgment was entered, through the filing of a notice of appeal. Appellate counsel was retained by AIGDC to evaluate the prospects of appeal and a trial transcript was ordered. Long before the trial transcript was ever completed, and less than six months after the post-trial motions were decided, AIGDC agreed to pay plaintiffs $8,969,500, which in effect was

the amount of the verdict, plus the prejudgment interest. During the post trial period, AIGDC made numerous settlement offers, despite the plaintiffs' total unwillingness to accept anything less than the full amount of the verdict and all prejudgment and post judgment interest.

By December 2004, when a judgment was entered in the amount of approximately $11,500,000 which included more than $2,000,000 in prejudgment interest, plaintiffs had recovered approximately $2.9 million from Zurich and the insurer for McMillan Tree Service. On December 17, 2004, AIGDC offered an additional $5 million on top of the Zurich and McMillan Tree Service payments, in response to plaintiffs Chapter 93A demand letter. Plaintiffs' Chapter 93A demand letter did not include a specific demand. Mr. Nitti, who authored the response to this demand letter, also offered to meet with plaintiffs' counsel to further discuss settlement. On January 20, 2005, Mr. Nitti met Mr. Pritzker at his office. Mr. Nitti asked Mr. Pritzker for a response to the $5 million offer. Mr. Pritzker referred to the offer as a "non-starter" and refused to respond with any counter demand.

On January 27, 2005, Mr. Pritzker wrote to defense counsel presenting a demand of $15.65, which was comprised of $9.65 million for the underlying case and an additional $6 million for the Chapter 93A claim. This combined demand was made in response to AIGDC's December 17, 2004 offer, which referred to both the underlying claim and the Chapter 93A claim. Following a second Chapter 93A demand letter and the institution of the present lawsuit in April 2005, on May 2, 2005, AIGDC sought to restart the settlement negotiations by increasing its offer to $5.75 million in addition to the $2.9 million the plaintiffs had already recovered. Plaintiffs responded by again demanding the full amount of the judgment, plus all post judgment interest.

On June 3, 2005, Mr. Nitti again traveled to Boston to meet with Mr. Pritzker to attempt to settle the case. At that time, the parties agreed to settle the underlying case in exchange of a payment by AIGDC of $8,969,500. Given the plaintiffs' demand for an additional $6 million to settle the Chapter 93A claim as part of the settlement of the underlying case, Mr. Nitti did not pursue a discussion of the settlement of that claim. Mr. Pritzker's former partner, who was responsible for introducing plaintiffs to Mr. Pritzker, described AIGDC's agreement to settle the underlying case without settling the Chapter 93A case as "hard to believe." Mr. Pritzker referred to the fact that "the 93A action remain[ed] open" as "the best part of the deal." He described the settlement of the underlying case as a "home run." The total amount recovered by plaintiffs' as a result of the underlying case was $11,842,495.00.

In summary, the post-trial efforts of AIGDC, like those at mediation and during the trial, reflect a diligent effort on the part of AIGDC to effectuate a fair and reasonable settlement and does not indicate any violation of either Chapter 93A or Chapter 176D.

Finally, the jury verdict in the underlying case should not be considered a yardstick for assessing the reasonable settlement value of that case. Juries are unpredictable and this fact was recognized by plaintiffs' counsel, Margaret Pinkham, who explained that plaintiffs' their clients "had reasons for concern" based on the subjective nature of

damages for pain and suffering and loss of consortium her "biggest fear was the jury coming in with a $2 million verdict." Massachusetts courts have also expressly recognized the problem in using a jury verdict to measure the reasonableness of an insurer's settlement efforts. Nevertheless, the fact that the underlying case was the largest jury verdict in Massachusetts in 2004 and, according to Mr. Pritzker, was the largest amount ever awarded for a paralysis case in Massachusetts supports the conclusion that AIGDC's settlement efforts were fair and reasonable. The fact that plaintiffs' experienced and "aggressive" counsel did not send AIGDC a 93A demand at any time prior to the entry of judgment can be viewed as further evidence that there was nothing unfair or deceptive about the manner in which the settlement negotiations were conducted. When aggressive plaintiff's attorneys believe that there is merit in a claim based on delay, they send a 93A demand. This puts an insurer to task to explain the basis for its delay. Similarly, when an experienced plaintiff's attorney believes there is merit in a claim based on an insurer's failure to effectuate settlement where liability is reasonably clear, they send a 93A demand. This requires the insurer explain the basis for its conclusion that liability is not reasonably clear, or to respond with an offer.

It is reasonable to conclude that plaintiffs counsel recognized that the greatest element of damages in the underlying case was pain and suffering and Ms. Pinkham has explained that "that juries often view with skepticism" claims for damages for pain and suffering, as well as claims for loss of consortium. Liability, which when used in G.L. c. 176D § 3 (9) (f) includes both fault and damages, was reasonably clear insofar as there was a relatively close range between the future special damages presented by plaintiffs expert and the figure established by defendants' expert. But that was not the element of damages driving the settlement valuation. The monetary damages to be calculated based on plaintiffs' pain and suffering and loss of consortium and parental society claims were never reasonably clear until they were awarded by the jury.

William T. Cormack, 6 McIntosh Street, Clarendon Hills, IL 60514

Mr. Cormack will offer testimony on the subject of AIGDC's conformance with its obligations as an insurer in connection with its investigation and effort to settle the Rhodes' claim resulting from Marcia Rhodes' January 9, 2002 motor vehicle accident. Mr. Cormack's professional experience and qualifications are detailed on his curriculum vitae which is attached at Tab B.

In forming the opinions he expects to present, Mr. Cormack reviewed deposition and trial transcripts from the underlying case, deposition transcripts and pleadings generated in the present litigation, and documents produced by both plaintiffs and defendants in the present litigation. He intends to review additional materials generated in this litigation. The factual background set forth below was derived from his review of these materials and form the basis of his opinions:

Factual Background

On January 9, 2002. Plaintiff Marcia Rhodes, while operating a Toyota Corolla, was directed by a police officer to stop on the roadway. While stopped, Mrs. Rhodes was struck in the rear by a tractor – trailer hauling liquid asphalt. The driver of the tractor – trailer was Carlo Zalewski, an employee of Drivers Logistics Cervices ("DL5"). Mr. Zalewski admitted that his attention had been momentarily diverted by a car turning left into the path of the tractor – trailer. He turned his head to follow this vehicle, and when he returned his attention to the roadway in front of him, he was virtually on top of Mrs. Rhodes' car. The police officer stopped Mrs. Rhodes' car because of work being done next to the roadway by McMillan's Tree Service grinding tree stumps. McMillan's Tree Service had not placed orange cones in the roadway, nor had it set up any other warning devices which might alert a motorist that work was being performed. This failure on the part of McMillan's Tree Service was a violation of administrative code regulations requiring such warnings.

Mrs. Rhodes, forty – six years old at the time of the accident, suffered a burst fracture of T12 of her spine resulting in paraplegia. She suffered several medical problems after her surgery and initial hospitalization. She claimed aggravation of her psychiatric condition, bipolar disorder.

Plaintiffs did not present provide any documentary support for the claim for past or future medical costs prior to August 2003, when a settlement demand package was submitted by M. Frederick Pritzker, counsel for plaintiffs. Prior to submitting the settlement demand package, Mr. Pritzker informed counsel for the defendants that the past medical costs were more than $900,000. The settlement demand package submitted in August 2003 reflected that the medical bills totaled $413,977.62, less than half the amount the Rhodes counsel previously claimed had been incurred as medical costs. The settlement demand package did not include any documentation to support a claim for lost wages by Marcia Rhodes or Harold Rhodes and no claim for lost wages on the part of either Harold Rhodes or Marcia Rhodes was ever presented. The settlement demand letter presented a claim for

approximately $2,200,000 in household services and future medical and personal care costs. This sum was based on the present value of those future costs. The defendants' life care planner determined the present value of the Rhodes' future costs to be approximately $1,487,000. The difference between plaintiffs' claimed amount of special damages and the amount determined by defendants' was more than $500,000.

The settlement demand letter written by Mr. Pritzker purports to "enumerat[e] the damages to which each plaintiff is entitled," however, it presents only a "demand [for] $16,500,000.00 in full settlement of all claims against all Defendants." Plaintiffs never presented separate demands for the loss of consortium claims.

Penske Truck Leasing Corporation ("Penske") owned the tractor trailer and leased it to Building Materials Corporation of America ("GAF"). The lease agreement contained an indemnification clause in favor of Penske.

National Union Fire Insurance Company of Pittsburg, Pa. ("National Union") issued a commercial umbrella liability policy to GAF with $50,000,000 in limits. Zurich American Insurance Company ("Zurich") provided primary insurance with $2,000,000 limits for GAF. Crawford & Company ("Crawford"), the Third Party Administrator, acted as Zurich's adjustor.

Plaintiffs filed suit against DLS, GAF, Zalewski and Penske on July 18, 2002. On October 20, 2003, McMillan's Tree Service was added as an additional defendant. By letter dated December 1, 2003, plaintiffs rescinded the demand for $16,500,000 and presented a new demand for $19,500,000. In the ensuing four months, AIGDC communicated with Zurich regarding Zurich's investigation of the Rhodes claim, including its efforts to determine whether there were other sources of settlement funds based on the contractual relationship between GAF, the named insured on the National Union policy, and the other defendants. AIGDC had a duty to its insureds to determine whether and the extent to which other insurance policies applied as either primary or pro-rata sources of contribution to the settlement funds. AIGDC also met with the insured, its in-house counsel and defense counsel retained by GAF and Zurich. AIGDC was informed that Zurich intended to make its policy limit available and requested a written tender of that limit. On March 31, 2004, counsel for the defendant GAF, Greg Deschenes, responded to plaintiffs' demand with an offer in the amount of $2,000,000. Zurich subsequently tendered its $2 million policy limit to AIG by letter dated on April 2, 2004.

The parties engaged in mediation in August 2004. Plaintiffs began by restating their $19.5 million demand. AIGDC increased defendants' offer to $2.75 million. Plaintiffs then presented a demand to $15 million, PLUS an assumption by AIGDC of Mrs. Rhodes future medical expenses. AIGDC responded to the new demand with an offer of $3.5 million. After AIGDC made the $3.5 million offer, Plaintiffs did not make any further demands at the mediation, or before trial. Harold Rhodes has testified that, after the mediation, he decided to let the jury decide the case.

Trial took place in September, 2004. AIGDC extended a number of settlement offers

during trial. The lowest demand presented by plaintiffs was $12.8 million. A verdict was returned on September 21, with $7,412,000 awarded to Marcia Rhodes. The jury awarded $1,500,000 to Harold Rhodes and $500,000 awarded to Rebecca for their loss of consortium claims. Judgment was subsequently entered for $11,950,000, reflecting the interest payable from day of suit. The case was fully and finally settled on June 3, 2005, when AIGDC agreed to pay $8,969,500. The total amount collected by plaintiffs was $11,842,495.00.

Opinions

The primary insurance policy issued by Zurich required Zurich to investigate and defend claims against its insureds. This contractual duty exists even when the claim presents exposure in excess of the primary policy limit. It is a generally accepted practice in the insurance industry, one which has been recognized by the courts, that the primary insurer must discharge its duty of investigation and evaluation in a prompt and diligent manner, even in cases in which it is apparent that its policy limit may be consumed. It is also a generally accepted practice in the insurance industry that an excess carrier will rely upon and not interfere with a primary carrier's duty to investigate, defend and settle claims. Viewed another way, an excess carrier will only assume control over the investigation, defense and settlement of a claim after the primary insurer has made its primary limit available to the excess carrier to contribute to the settlement.

This generally accepted industry practice is based in part on the respective contractual duties owed to the insured by primary and excess carriers. In connection with the investigation, defense and settlement of claims, the Zurich primary policy states:

> We have the right and duty to defend any "insured" against a "suit" asking for damages . . . we may investigate and settle any claim or 'suit' as we consider appropriate.

The excess policy issued by National Union Fire Insurance Company of Pittsburgh, PA, for which AIGDC handled the claim, states:

> We will not be obligated to assume charge of the investigation, settlement or defense of any claim made, suit brought, or proceeding instituted against the insured.

As a matter of practice in the industry, excess insurers rely upon and do not interfere with primary insurers' efforts in performing their duties to investigate, defend and settle claims against their mutual insured. This practice is also reflected in the "Guiding Principles for Primary and Excess Insurance Companies." This guideline states:

> If at any time it should reasonably appear that the insured may be exposed beyond the primary limit, the primary insurer shall give prompt written notice to the excess insurer, when known, stating the results of investigation and negotiation, and giving any other information deemed relevant to a determination of the total exposure, and inviting the excess

insurer to participate in a common effort to dispose of the claim.

It is axiomatic that the primary insurer in such situations must make its limits available for settlement of the claim. In the present case, AIGDC complied with its contractual duties and conformed to the generally accepted industry practices by relying upon Zurich to investigate the claim, direct the defense, and to provide AIGDC with the results of the investigation being conducted through pre-trial discovery. AIGDC properly relied upon Zurich to obtain and share all information relevant to a determination of the total exposure. The overarching goal shared by Zurich and AIGDC was to protect their mutual insured and dispose of the claim. The protection of the insured in this context is not limited to the insured's own financial exposure. In the present case where there was more than $52 million in liability limits available to the insured, protecting the insured meant resolving the case for a reasonable amount and no more. The amount insurers pay to settle claims or satisfy judgments are passed back to the policyholder through premiums. Moreover, publicly held insurance companies like those involved in this case, have a duty to their shareholders to protect corporate assets. Those interests are not placed above the insurers' interest in promptly and fairly resolving claims; however, those interests cannot be disregarded.

Zurich made its policy limit available to plaintiffs on March 31, 2004. Prior to that time, AIGDC had retained separate counsel, Campbell, Campbell, Edwards & Conroy to assist Nixon Peabody, the firm retained by the GAF and by Zurich. AIGDC had requested all pertinent information and copies of all pleadings and documents developed in the case from Zurich and its counsel. AIGDC initiated a meeting with the insured and its in-house and corporate counsel which took place on March 5, 2004. Based on its review and analysis of the materials provided, AIGDC had also determined that critical discovery remained to be taken. This included the depositions of the plaintiffs Marcia Rhodes and Rebecca Rhodes, an independent medical examination of Marcia Rhodes, a further effort to obtain medical records that plaintiffs had refused to produce and which the court had refused to compel, analysis of the recently filed Third Amended Complaint (March 6, 2004), alleging for the first time that GAF was a motor carrier under various Federal statutes and regulations, and depositions of plaintiffs' medical experts Dr. Donna Kranth, Dr. Norman Beisaw and Dr. Elizabeth Roaf.

Plaintiffs' expert witness on the subject of claim handling practices, Arthur Kiriakos, acknowledges that an excess carrier's duty arises when a "formal tender of the primary policy is received." Although Mr. Kiriakos does not note the distinction between a tender of the policy ***limit***, and a tender of the "policy," he appears to be referring to the former. The tender of the primary policy would include a tender of the duty to defend and, if accepted, would relieve the primary carrier of a significant obligation it undertook when it accepted the premium for the policy. It is both a matter of contractual policy language and generally accepted practice that a primary carrier must continue to pay for the defense of a claim against its insured even after it tenders its policy limit to the excess carrier. Zurich tendered its limits to AIGDC in writing by letter dated April 2, 2004. Massachusetts courts have recognized that an excess insurer has no obligation to make an explicit settlement commitment until the primary insurer has acted. See Clegg v. Butler, 424 Mass. 413 (1997).

To review the relevant timeframe, plaintiffs presented a settlement demand package on until August 13, 2003. Plaintiffs increased their demand in December 2003. On March 31, 2004, Zurich extended a settlement offer in the amount of $2 million, the limit of the Zurich policy. As defense counsel retained by Zurich and the insured had not completed discovery which was critical to the evaluation of the claim for settlement purposes, counsel retained by AIGDC undertook that effort. In addition, as explained by the Nicholas Satriano, the AIGDC claim handler, AIGDC had an obligation to its insured to investigate any coverage issue which might lead to other sources of insurance or funds which might be available to settle plaintiffs' claim. It is well established that a "true excess" insurer, such as the National Union policy was in this case, is excess over all primary coverage available to any of the insureds. Therefore, AIGDC had an obligation to investigate whether there was any other primary insurance that was available to its insureds that would cover the underlying Rhodes claim.

AIGDC's claim handling efforts were made more difficult by the outrageously high demands made by plaintiff and their failure to even respond to the offer of the Zurich policy limit. AIGDC's difficulty in moving the claim toward resolution was further exacerbated by the unrealistic conditions imposed by plaintiffs' attorneys as a prerequisite to mediation. As indicated in Zurich's claim notes, "plaintiffs' counsel has stated that he will not agree to participate in any voluntary mediation of this claim unless the co-defendants commit to a minimum settlement offer of $5,000,000."

In conditioning any further negotiation by plaintiffs upon an offer of $5,000,000 by the defendants, plaintiffs' attorney sent the message that he would not respond to any offer of less than $5,000,000. Yet plaintiffs did not reduce their demand in response to the $2 million offer. Plaintiffs have complained in this case that the AIGDC delayed in responding to their settlement demand; however, what plaintiffs actually seem to be complaining about is AIGDC's refusal to make the offer that plaintiffs' counsel insisted be made. In addition to the fact that plaintiffs' counsel's tactics undermined productive settlement discussions, this tactic could be viewed as a breach of the obligation of every party to bargain in good faith. While G.L. c. 176D proscribes unfair settlement tactics by insurers, there is no corollary duty imposed on claimants to negotiate in good faith. Nevertheless, an insurer's conduct must be viewed in context and in handling the claim by the Rhodes, the conduct of plaintiffs and their counsel made settlement far more difficult. If the tables were turned and an insurer required a claimant to reduce his demand to a specific number as a condition to mediation, there is little doubt it would be found to be an unfair settlement practice.

Plaintiffs' counsel ultimately determined that his precondition to mediation was impeding the settlement efforts and plaintiffs agreed to go forward with mediation, but plaintiffs persisted in their hardball tactics at the mediation. To the extent plaintiffs complain of delay, it can only be viewed to be a result of their own ineffective settlement tactics.

The mediation took place on August 11, 2004. Though plaintiffs had not responded to the offer of $2 million, AIGDC made another offer at mediation with the hope that it would precipitate a meaningful reduction in plaintiffs' demand. In response to the offer

of $2.75 million, plaintiffs made a demand of $15,000,000, plus an assumption of plaintiffs' health insurance costs. This demand was higher than the $16.5 million plaintiffs initially demanded. Since Marcia Rhodes was a paraplegic, she would not be underwritten by any health insurer. Consequently, assuming her health insurance costs would in essence be an assumption of all of her future health care costs. According to plaintiffs' expert, the present value of those costs was more than $2,000,000. Thus, after two offers by the defendants, plaintiffs' negotiation strategy was to increase its demand. Despite this backward motion by plaintiffs during the course of the mediation, AIGDC increased its offer to $3,500,000. During the mediation, plaintiffs also received and accepted an offer of $550,000 from the insurer for McMillan's Tree Service. The total amount offered by the defendants was $4,050,000. In light of plaintiffs' demand and in light of AIGDC's thorough analysis of the value of the claim, this offer was reasonable. Moreover, while plaintiffs made no downward move from their inflated and unreasonable pre-mediation demand, AIGDC never closed down bargaining by refusing to move in their negotiations. AIGDC remained flexible. Plaintiffs did not.

AIGDC's bargaining was bargaining as it should have been done and it reflects the custom and practice by which the vast majority of claims are settled. Bargaining is at the heart of litigation. Negotiation is largely an art of perception and casting perceptions. AIGDC presented a conciliatory, reasonable approach to the negotiation. In stark contrast, plaintiffs showed little interest in closing the gap. Plaintiffs and their counsel now claim that they would have settled for $8 million. However, where before trial they never reduced their demand below $15 million plus the assumption of all future medical costs, nothing close to that purported bottom-line figure could be discerned from their conduct before, during or after the mediation.

At the trial in September, 2004, AIGDC continued its efforts to settle the case and continued to negotiate in good faith, offering $6,000,000, on top of the $550,000 plaintiffs already received. In my opinion, this sum is well within the range of a reasonable settlement. Plaintiffs' demand never went below $12,800,000, exclusive of the $550,000 they had previously received from the insurer for McMillan's Tree Service.

By custom and practice in the insurance industry, and as an elemental principle of negotiation, each party to a negotiation keeps an eye on the place where that party wants to be at the end of the negotiation. As long as there are unreasonable demands, wide latitude is granted an insurer to maneuver in an effort to bring about a reasonable demand. Without a reasonable demand, a reasonable settlement cannot be effectuated. Plaintiffs' expert, Mr. Kiriakos, states that "there is no question that a settlement value of this case was somewhere between $6 million to $8 million." However, Mr. Kiriakos fails to note that AIGDC extended an offer of $6 million, which would have brought the total recovery by plaintiffs to $6.55 million, well within the range of his opinion of a reasonable settlement. He also fails to state that beginning at the mediation, AIGDC's offers approached $6 million more and more closely, while plaintiffs demand remained the same distant figure. Plaintiffs demand never approached their expert's own settlement range while AIGDC offer put the settlement amount well into that range.

Mr. Kiriakos admits "it is an acceptable practice to extend an initial or opening offer

which is lower that the target settlement value." This is also recognized as a reasonable good faith practice by Massachusetts courts. The test of reasonableness of an offer cannot be fairly judged without consideration of the demand. In light of plaintiffs' unreasonable demands, each offer by AIG was reasonable and fully complied with custom and practice in the insurance industry. Moreover, accepting plaintiffs' expert's opinion that a reasonable settlement range was $6-8 million, AIGDC's offers appear reasonable even without a consideration of plaintiffs' demands. This is evidence of more than good faith; it is evidence of the best faith. It reflects AIGDC's determined and diligent effort to effectuate settlement even though objectively, there did not appear to be any realistic opportunity to meet plaintiffs' demand. There exists no evidence in the record that AIGDC took the position with any of its offers that it was a final, "drop-dead" offer. To the contrary, the evidence shows that AIGDC continuously remained flexible and willing to negotiate.

Plaintiffs received a jury verdict award of $9,412,000, consisting of $7,412,000 for Marcia, $1,500,000 for Harold, and $500,000 for Rebecca. AIGDC filed post-trial motions based on a reasonable belief that Marcia Rhodes testimony at trial that the accident caused her profound emotional distress and exacerbated her pre-existing bipolar disorder, demonstrated that defendants should have been entitled to discover her pre-accident psychiatric records. AIGDC notes reflect the import of this issue:

> Mrs. Rhodes claimed prior to trial, and at trial, that her injuries have caused significant psychological trauma such as anxiety and depression. Some of the medication she has been prescribed and (according to her Life Care Plan) will continue to be prescribed into the future are designed to treat psychological complaints. Mrs. Rhodes apparently had a variety of psychological complaints prior to the accident, such as bipolar disorder and attention deficit disorder/hyperactivity disorder, and had been on Lithium. Yet the records for this treatment were not provided to the defendants, to allow them to evaluate properly Mrs. Rhodes's claim.

At trial, on the subject of emotional distress, Mrs Rhodes testified:

> I'm depressed . . . not the manic-depressive depressed, getting up depressed, like what's the point, that kind of depressed. I don't see the point of all this. Going through all of this . . . I feel like I'm going through the motions because it is expected of me to go through the motions. But that's all I'm doing—going through the motions. There's a part of met that's not involved in this at all. It's removed itself from this, and maybe I'll never accept it. Maybe I will, but right now, every day, it's just getting through the day. . . . I wish I had been killed in the crash instead of just paralyzed. I think about how many valium it would take. Dark thoughts. Things I shouldn't be thinking about, but I do.

After the post-trial motions were denied, and after retaining appellate counsel to review the record, AIGDC filed a notice of appeal to preserve its appellate rights. AIGDC ordered a trial transcript and continued in its effort to effectuate settlement. AIGDC

offered $7,000,000 to resolve the claims. The $7,000,000 offer excluded the $550,000 already paid by McMillan's Tree Service and included a $1,250,000 structure for a life care plan for Mrs. Rhodes yielding a projected benefit, to age seventy, of $3,452,333. Plaintiffs' attorneys rejected this offer and instead of responding with an offer of compromise, he presented a demand for the full value of the judgment plus an additional $6,000,000 to settle the threatened G.L. c. 93A claim. In presenting a demand for the settlement of both the underlying claim and the 93A claim, plaintiffs counsel revealed that his professed "surprise" that AIGDC sought a release for the 93A claim as part of the settlement was nothing more than gamesmanship.

Plaintiffs' intransigence continued to delay a resolution of the claim with AIGDC. By December 2004, plaintiffs had received payments from the insurer for McMillan Tree Service and Zurich which totaled nearly $2.9 million and plaintiffs have continually emphasized the fact that the judgment was accruing interest at 12% per year. Plaintiffs had no urgency in collecting from AIGDC and this is reflected by the conduct of plaintiffs' counsel in January 2005 when he accepted the invitation to meet with AIGDC's claim director, Warren Nitti. Mr. Nitti traveled from New York to Boston only to turn around immediately when plaintiffs' attorney referred to the offer on the table as a "non-starter." While Mr. Nitti had authority to increase the offer, it was not for the full amount of the judgment and the perception created by plaintiffs' attorney was that he would accept nothing less.

While waiting for the trial transcripts, AIGDC decided to settle the case regardless of the merits of an appeal. On June 3, 2005, Mr. Nitti again traveled to and plaintiffs agreed to settle the underlying case in exchange of a payment by AIGDC of $8,969,500. In correspondence relating to settlement, plaintiffs had expressed an interest in including a release for the 93A claim in the settlement. Mr. Nitti did not pursue a discussion of the settlement of the 93A claim along with the underlying claim because plaintiffs' demand for an additional $6 million for that release seemed as unrealistic as plaintiffs $16.5 million demand in the underlying case. Plaintiffs' attorney described the settlement of the underlying case as a "home run." The total amount recovered by plaintiffs' as a result of the underlying case was $11,842,495.00.

The deposition of Marcia Rhodes, taken on August 24, 2006, revealed that no offers of settlement made by the defendants were ever communicated by the plaintiffs' attorneys to Marcia Rhodes. (Mrs. Rhodes Depo. P. 7). In fact, prior to her deposition which took place on August 24, 2006, she was not aware that the AIGDC had paid her nearly $9 million and that along with her husband and daughter, she had received $11,842,495.00.

The testimony is revealing:

Q. Okay. And at some point after the trial, I believe in June of 2005, there was a payment that resolved the claim against the trucking companies. Are you aware of that?

A. No

Q. Today, is it your understanding that you have fully recovered what you're entitled to [re]cover as a result of the trial against Mr. Zalewski and the trucking companies?

A. No

Q. What is your understanding?

A. My understanding is that this is being dragged out for an inordinate amount of time; and the longer it takes, the greater the stress.

Q. Can you explain what you mean by "this," when you say "this is being dragged out"?

A. That the jury said that X was the award that we were supposed to get and that we didn't.

Q. Okay. And as your sitting here today, it's your understanding that you still haven't gotten that money?

A. I don't know."

The gravamen of plaintiffs' Chapter 93A claim is that unjust delay had subjected the plaintiffs to many of the costs and frustrations when no settlement is reached and litigation must be instituted. If Marcia Rhodes was not aware of the $550,000 payment by the insurer for McMillan Tree Service in August/September 2004, the $2.33 million payment by Zurich in December 2004 or the $8,969,500 paid by AIGDC between June and August 2005, there is no basis for her to claim that such stress and such frustrations were caused by the AIGDC.

VERIFICATION

Kenneth P. Horenstein, Esq., for Defendant, AIGDC, verifies and says that the facts set forth in the foregoing ***Answers of AIG Domestic Claims, Inc. to Plaintiffs' First Set of Interrogatories*** are true and correct to the best of his knowledge, information and belief.

Kenneth P. Horenstein

Respectfully Submitted,

AIG Domestic Claims, Inc. and **National Union Fire Insurance Company of Pittsburgh, PA**

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CERTIFICATE OF SERVICE

I, Anthony R. Zelle, certify that on this 25th day of September, 2006, I caused a copy of the foregoing to be served by e-mail and first class mail upon the following:

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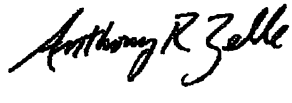

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