93A Letter

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VIA CERTIFIED MAIL

Attn: Claims Department
National Union Fire Insurance Co. of
Pittsburgh, PA
Administrative Offices
70 Pine Street
New York, NY 10270-0150

Certified Mail No. 7160 3901 9842 5525 2371

Attn: Claims Department
Zurich American Insurance Company
1400 American Lane
Schaumburg, IL 60196-1056

Certified Mail No. 7160 3901 9842 5525 2265

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 Sirs:

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 Zurich American Insurance Company ("Zurich") and National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union"), a member company of American International Group, Inc. ("AIG"), 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.

Under Massachusetts law, insurers are obligated to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," G.L. c. 176D, §3(9)(f), and failing to do so is a violation of Chapter 93A, § 9(1). See Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 564 (2001) (G.L. c. 93A incorporates c. 176D, making failure to settle claims in a prompt, fair and equitable manner when liability has become reasonably clear, by definition, a 93A violation). Anyone injured by an insurer's unfair settlement practices, including the Rhodes family, has a right to sue for such a violation. G.L. c. 93A,

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§ 9(1); Clegg v. Butler, 424 Mass. 413, 419 (1997) ("the specific duty contained in subsection (f) is not limited to those situations where the plaintiff enjoys contractual privity with the insurer.").

As the facts recited below will establish, Zurich and National Union insured interests of parties whose liability was clear, the aggregate coverage was $52 million, no offer of settlement was made at all until more than 2 years after the occurrence, and when an offer of settlement was finally made, it was woefully inadequate. My clients ultimately received a jury verdict for $11,844,000 (including pre-judgment interest), which has not been paid, nor has there been any post-judgment offer of settlement. By not abiding by the obligation to make a prompt, fair and equitable settlement, Zurich and National Union violated Chapter 176D and Chapter 93A, and are now potentially liable for treble damages plus attorneys' fees.

The claims of the Rhodes family arose out of the operation of a truck leased by your insured, Building Materials Corp. of America d/b/a GAF Materials Corp. ("GAF"). Zurich as the primary carrier (Zurich Policy Nos. GLO216569505 and MA216569205-MA) and National Union (National Union Policy No. BE 357 40 698 (renewal of 9323693)) as the excess carrier, insured GAF, the motor carrier, and through GAF, insured Carlo Zalewski, the driver, and Driver Logistics Services, who supplied the driver.

The occurrence that caused Mrs. Rhodes' injuries happened on January 9, 2002 when Mr. Zalewski slammed into the back of Mrs. Rhodes' stopped car, paralyzing her from the waist down. Liability was reasonably clear from the beginning: the occurrence was a rear-end collision at a highly visible worksite, where the police officer who stopped Mrs. Rhodes was standing in the middle of the road wearing a fluorescent jacket; the driver had a clear and unobstructed view from the top of an 800 foot slight decline; and although he had 12 seconds to observe the scene and stop, Zalewski did not even slow down until after he crashed into Mrs. Rhodes' vehicle.

The police conducted an investigation at the scene and determined that Zalewski was negligent. In fact, at the scene Zalewski admitted that he had not been paying attention to the traffic in front of him. The police investigation was followed by an accident reconstruction performed by Trooper Edward O'Hara of the Massachusetts State Police. Trooper O'Hara determined that the cause of the accident was the failure of the driver, Mr. Zalewski, to use care in braking. Driver Logistics, which employed Zalewski, conducted its own investigation and determined the occurrence was "preventable," and terminated Zalewski on January 28, 2002, less than one month after the occurrence. Driver Logistics then communicated this to GAF, because Zalewski had been assigned to GAF routes before the accident. In November 2002, Mr. Zalewski admitted to sufficient facts to warrant a guilty finding of negligent operation of a motor vehicle in the criminal proceeding arising from the accident. Admitting

to sufficient facts has the same effect as a guilty plea. See Davis v. Allard, 37 Mass. App. Ct. 508, 510 (1994) *rev'd on other grounds sub nom.* Davis v. Westwood Group, 420 Mass. 739 (1995) (holding that in a negligence action, defendant's admission to sufficient facts to the allegations of operating an automobile under the influence of intoxicating liquor and operating an automobile so as to endanger life and safety was admissible in evidence). Given all of these facts, the only possible conclusion was that Zalewski was negligent, thereby making his liability, as well as the liability of GAF (the motor carrier) and Driver Logistics (the employer) more than reasonably clear.

GAF's liability was based, among other things, on its role as statutory employer because it was the motor carrier on whose behalf the truck was being driven. See 49 C.F.R. § 376.12(c)(1); see, e.g., Planet Ins. Co. v. Transport Indem. Co., 823 F.2d 285, 288 (9th Cir. 1987) (affirming district court's determination that motor carrier's insurer was responsible for losses because driver was motor carrier's statutory employee); Graham v. Malone Freight Lines, Inc., 948 F. Supp. 1124, 1132-33 (D. Mass. 1996) (discussing the statutory employment doctrine which makes carrier-lessee statutorily liable for accidents while lease is in effect), clarified on reconsideration, 43 F. Supp. 2d 77, aff'd, 314 F.3d 7 (1st Cir. 1999). Driver Logistics' liability was based on its role as actual employer.

Although Zalewski, Driver Logistics and GAF did not admit liability in court until the week before trial, the facts giving rise to them admitting to liability were well known to them and to Zurich and National Union for more than two years. Additionally, as of August 2003, defendants Zurich and National Union knew of the Rhodes family's out-of-pocket expenses and medical expenses, but still refused to make a settlement offer. By that time the defendants had over a year to conduct discovery and the Rhodes family continued to update the defendants on Mrs. Rhodes' medical condition. Furthermore, in addition to sending a detailed demand to all defendants explaining theories of liability, the Rhodes family also provided your insureds with a detailed description of Mrs. Rhodes' injuries, her out-of-pocket expenditures, her medical bills and the cost of her life-care plan. Thus, Zurich and National Union knew that Mrs. Rhodes' special damages as of August 2003 were $2,817,419.42 (which rose to $3,201,670 by the time of trial). Therefore, with liability and damages being reasonably clear, Zurich and National Union had the duty to "effectuate prompt, fair and equitable" settlement of the Rhodes family's claims. See, e.g., Hopkins, 434 Mass. at 564. Zurich and National Union forced plaintiffs to continue incurring the medical and related costs, as well as the frustrations and delays of litigation. This, in turn, forced Mrs. Rhodes to forego certain medical treatment and rehabilitation, including hiring a life-care planner and implementing a proper life care plan, which could have speeded and improved her rehabilitation, all because of limited funds.

Rather than make any effort to comply with their duty to "effectuate prompt, fair and equitable" settlement of claims, Zurich and National Union failed to make any response to Plaintiffs' settlement demand, and similarly failed to respond to a second demand. Zurich never made a settlement offer until March 2004, more than two years after the accident and seven months after Plaintiffs' first demand. Zurich's continued refusal to make any settlement offer, thereby forcing Plaintiffs to continue to litigate a matter in which damages clearly exceeded the $2,000,000 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).

National Union made no settlement offer at all until mediation on August 11, 2004 two-and-a-half years after the occurrence, one year after the Rhodes family's first demand, one month before trial, and only three weeks before defendants filed papers admitting liability. See Hopkins, 434 Mass. at 560-61 (insurer did not respond to plaintiff's demand letters); Clegg, 424 Mass. at 422 (no offer made until mediation three years after accident); Miller v. Risk Mgmt. Found. of Harvard Med. Inst., Inc., 36 Mass. App. Ct. 411, 419 (1994) (finding violation of c. 93A where insurer "did not respond for six months to the first demand . . . [i]ts first offer of settlement . . . came two years after notice of the accident, nineteen months after liability was reasonably clear, and five months after the c. 93A demand."). Furthermore, when National Union finally did make a settlement offer, it was so low that it could not be considered an attempt to "effectuate prompt, fair and equitable settlement" and was a violation of National Union's 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). National Union's offer of $1.5 million (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. It left less than $300,000 for her pain and suffering, Mr. Rhodes' loss of consortium claim or their daughter Rebecca's loss of consortium claim. The conduct of National Union, both in refusing to make any settlement offer followed by a late "lowball" offer that all but ignored Mrs. Rhodes' pain and suffering and completely ignored her family's claims, 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); Clegg, 424 Mass. at 422 (treble damages awarded where insurer did not respond to demands in a timely fashion, and later made a "lowball" offer); Miller, 36 Mass. App. Ct. at 419 (treble damages where first settlement offer, which was ultimately low, not made until six months after demand, two years after the accident, nineteen months after liability was clear, and five months after 93A demand).

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 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.

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/jlw
cc: William J. Conroy, Esq.
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