EXHIBIT B

No. 13141-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CENTURY INDEMNITY COMPANY,
a foreign corporation,

Plaintiff-Appellant,

v.

TRUCK INSURANCE EXCHANGE OF
THE FARMERS INSURANCE GROUP,
a reciprocal or inter-insurance exchange,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF

RICHARD A. LEE, WSB NO. 17537
BODYFELT MOUNT STROUP & CHAMBERLAIN
Attorneys for Appellant

300 Powers Building
65 S.W. Yamhill
Portland, Oregon 97204-3377
Telephone (503) 243-1022

TABLE OF CONTENTS

		Page
A.	REPLY TO TRUCK'S STATEMENTS OF THE CASE	1
1.	Century's Monitoring of the Fox Case Does Not Alter the Nature or Extent of Truck's Obligation of Good Faith and Fair Dealing	1
2.	Neither Truck Nor Its Appointed Defense Counsel Needed Century's Approval or Authority to Commence Settlement Negotiations	2
3.	Liability Was Disputed--So What?	4
4.	Truck Misconstrues the Evidence	5
5.	Century Did Not Appeal the Fox Judgment--Again, So What?	7
6.	Procedure Below	8
B.	REPLY TO TRUCK'S ARGUMENTS	8
1.	Century's Evidence, Offered in Opposition to Truck's Motion for Summary Judgment, Was Not Only Admissible, It Was a Necessary Element of the Cause of Action	9
2.	Truck's Tender of Its Limits Did Not Extinguish Its Contractual Duties	10
3.	Aetna Ins. Co. v. Borrell-Bigby Elec. Co. Is On Point	13
4-5.	Equitable Subrogation Applies Under the Facts of This Case	13

Page

6. Xenophobia Is Not A Good Basis Upon Which to Reject An Appropriate Legal Principle 17

7. Direct Duty--Another Approach 18

8. There are Genuine Issues of Material Fact As To Both Causation and Damages 19

9-12. Century is Not Equitably Estopped 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Page

Aetna Ins. Co. v. Borrell-Bigby Elec. Co.,
541 So2d 139 (Fla App 1989) 13

Continental Cas. Co. v. United States Fidelity & Guaranty Co.,
516 F Supp 384, (ND Cal 1981) 5

Hartford Ins. v. General Acc. Group Ins.,
578 NYS2d 59 (1991) 20

Hoaglund v. Raymark Industries, Inc.,
50 Wash App 360, 749 P2d 164 (1987) 9

Kagele v. Aetna Life and Cas. Co.,
40 Wash App 194, 698 P2d 90 (1985) 15

Mazur v. Merck & Co., Inc.,
742 F Supp 239 (ED Pa 1940). 9

Nyby v. Allied Fidelity Ins. Co.,
42 Wash App 543, 712 P2d 861 (1986) .15

State v. Hamilton,
58 Wash App 229, 792 P2d 176 (1990) 9

Van Buskirk v. Carey Canadian Mines, Ltd.,
760 F2d 481 (3d Cir 1985) 9

Viking Ins. Co. v. Hill,
57 Wash App 341, 787 P2d 1385 (1990) 11, 12, 13

APPELLANT'S REPLY BRIEF

PRELIMINARY COMMENT: For ease of reference, this reply brief follows the format and numbering system used in Truck's answering brief.

A. REPLY TO TRUCK'S STATEMENT OF THE CASE

Century takes issue with Truck's assertion (Ans Br at 1) that "Farmers [Truck] provided WECo with a defense of the Fox case pursuant to its obligation under its policy of primary insurance." In fact, Truck breached its defense obligation by withdrawing from the defense of its insured. Truck was obligated to defend unless and until its policy limits were "exhausted by payment of judgments or settlements." Policy Part I, ¶ 2 - CP 71, 326. Truck jumped the gun by abandoning its insured after the jury verdict and before important post-trial issues had been resolved. See argument and authorities in Op Br at 12-18.

1. Century's Monitoring of the Fox Case Does Not Alter the Nature or Extent of Truck's Obligation of Good Faith and Fair Dealing.

Truck argues (Ans Br at 1-3) that it should be absolved of all responsibility for its conduct simply because Century took the prudent step of assigning someone to monitor Truck's handling of this multi-

million dollar claim. It is one thing, however, to monitor someone else's claims handling and it is another to be the person or entity with primary responsibility for the claim. Nothing that Century did relieved Truck of its legal obligations to defend, to act in good faith, and to give its insured's interests at least the same consideration it gave its own interests. The insurer's duties, in this regard, are discussed more fully in Op Br at 19-21.

2. Neither Truck Nor Its Appointed Defense Counsel Needed Century's Approval or Authority to Commence Settlement Negotiations.

Truck argues (Ans Br at 3-4) that it was relieved of its duties because no representative of the excess insurer ever instructed or authorized Truck to accept a particular settlement demand or to make an offer or counteroffer. Truck forgets, it was the one that, in its policy of insurance, accepted the duty to defend. It was the one that agreed to investigate the claim and to settle, or not, as it saw fit. And Truck also forgets that, as long as it controlled the defense (which it did here), it had the obligation to, in good faith, view the case as if there were no policy limits applicable to the claim. See discussion in Op Br at 19-21.

What that means in the context of this case is that Truck had an obligation to evaluate the claim, recognize that it was a case with

significant excess exposure, and *recognize* that it would require its policy limits, as well as some part of the excess insurer's limits, to settle the claim. With that understood, it was incumbent upon the primary insurer to release its policy limits to the excess insurer so that settlement negotiations could begin in earnest.

None of that happened. Although Fox's defense counsel forthrightly opined that this case had a multi-million dollar potential and that there was no better than a 50/50 chance of a defense verdict, Truck simply stuck its head in the sand. It chose to try the case. It made no settlement overtures to Fox or Fox's counsel. It never offered a dime. It never released its limits to the excess insurer, despite numerous requests. It tied the excess insurer's hands. See discussion in Op Br at 41-42.

Why did Truck behave in this manner? It did so because *it* was putting its interests ahead of all others. It had a substantial sum invested in defense costs. It had very little to lose if the case were lost because its aggregate policy limits were eroded down to $166,000. And it had a lot to gain by risking its insured's money and/or the money of the excess insurer. It is easy to gamble with other people's money--but such unreasonable risk-taking also constitutes bad faith.

3. <u>Liability Was Disputed--So What?</u>

Truck argues (An Br at 4-5) that somehow its obligations are lessened because liability in the underlying case was disputed. Imagine that! A case of *disputed liability*. *So what?*

The only cases where liability is <u>not</u> disputed are cases where liability is admitted. *Is it only in cases of admitted liability* that a primary insurer is obliged to take steps toward settlement in an effort to avoid injuring its insured? That would be a novel rule. Yet *that is* essentially what Truck argues: Because liability was not crystal clear, there was no obligation to try to settle this $7 million dollar dispute. Apparently, under Truck's contorted logic, the existence of a dispute gives the insurer a license to gamble with others' money in an effort to better its own position.

Lest the court be taken in by this argument, and by Truck's selective citations to the record, the following should also be noted:

- Ken Smith of WECo testified that his views regarding the defensibility of the case were based on the science, not the law.
- Truck gave Smith no options regarding trial versus settlement.
- Truck never told Smith that defense counsel was of the opinion that there was a 50% chance of losing the case.

Smith Dep - CP 222-23. Thus, it is no defense for Truck to now argue

that it was simply doing what its insured wanted it to do. Its insured was not knowledgeable as to Truck's legal obligations. Truck did not give its insured all the facts. And Truck's obligations extended beyond the duty to protect just its insured in this excess exposure case.

4. Truck Misconstrues the Evidence.

First, the March 30, 1989 letter requesting release of Truck's limits (so that settlement negotiations could commence) was not the first or only time that Century's representative inquired as to if, and when, Truck was going to make its limits available. Prior to that time, Mr. Emery requested a release of limits on numerous occasions, and he also raised the topic of settlement in his first or second meeting with Truck's claims manager in early 1988. See Op Br at 36-39, 41-42.

Second, the letter makes clear that Century was unable to make an offer to the claimant "without a commitment from Farmers [Truck] for the balance of their limit." Where the underlying demand is in excess of the primary carrier's limits, the burden is on the primary carrier to approach the excess carrier, express the primary carrier's decision to release limits, and inquire about the excess carrier's willingness to contribute toward settlement. The question of whether such a contribution is needed, however, does not even arise unless and

until the primary carrier has decided it is willing to release its limits. [1] Continental Cas. Co. v. United States Fidelity & Guaranty Co., 516 F Supp 384, 388-89 n 3 (ND Cal 1981). Here, of course, Truck never offered to release its limits until after the jury returned its $2.8 million verdict.

Third, Truck's reliance on the March 30 letter is misplaced and takes the language of that letter out of context. The letter seeks Truck's limits and confirms that if Truck will release limits, and if the case is settled, then Century would take over all remaining liability claims from Truck, the primary insurer. The reason Century made this statement is clear from the context of the letter, but not from the argument set forth in Truck's brief. The letter states: "[Century] acknowledges that if your indemnity limits are exhausted in the Fox case, [Century] then takes over all remaining liability claims." Why? Because, by so doing, Truck would have exhausted its policy limits by payment of claims. That is the condition, pursuant to the policy language quoted on page 1 of this brief, that discharges Truck's duty

[1] Part of Truck's problem, apparently, was that it could not even make a timely, accurate, ascertainment of its own remaining aggregate limits. Truck gave Century inaccurate information in this regard and took more than a year to resolve what should have been readily available in a matter of days. See Op Br at 33-34.

to defend. Obviously, then, if Truck pays its limits toward a settlement, its duties are fulfilled and the duty shifts to Century. However, this latter point does not mean, as Truck argues (Ans Br at 5-6), that Century was agreeing to take over the continued duty to defend where no settlement was achieved. Furthermore, regardless of what claims people and insurance brokers put in their letters to one another, the nature and extent of Truck's duty to defend is dictated by the clear, unambiguous language of the policy--nothing more, nothing less. In this regard see Op Br at 12-18.

5. Century Did Not Appeal the Fox Judgment--Again, So What?

Truck correctly points out (as did Century in its Op Br at 9-10) that the Fox case was settled for a $700,000 discount, after the jury returned its verdict, after Truck abandoned its insured, after partially successful post-trial motions were decided, and before the filing of a notice of appeal. Apparently, under Truck's theory of the case, a plaintiff in a bad faith case can only perfect its cause of action if it stands idly by and suffers the full brunt of the errors committed by the primary insurer. In other words, under Truck's approach, if the insured or its excess insurer lifts one finger in an effort to mitigate its damages, it forfeits its right to seek redress for the damage caused by

the primary insurer's negligence or bad faith.

The policy of the law is, of course, 180 degrees to the contrary. Settlements are encouraged and potential plaintiffs have an affirmative obligation to mitigate their damages. Century's post-verdict conduct in this case was, quite obviously, motivated by these appropriate goals. Truck should not now be handed a bonus defense as a result of Century's responsible conduct.

6. Procedure Below

Whether or not WECo "expressed complete satisfaction" (Ans Br at 8) with Truck's handling of the defense is of no moment. That statement is true, generally, where an insurer provides a defense to its insured under an insurance policy such as that issued by Truck, and even in the absence of any excess exposure, because the insurer, not the insured, has the right and obligation to defend the case and to settle the claim. CP 71, 326.

The statement is just as true, and of much greater significance, where, as here, the primary insurer is handling a claim that has excess exposure and that is covered by excess insurance. In that situation, the insured's declaration of "complete satisfaction" becomes essentially irrelevant, because the primary insurer's mishandling of the claim does not create risk for the insured, but, rather, creates risk for the excess

insurer. Truck does not claim, nor could it, that Century ever expressed "complete satisfaction" with the handling of the Fox case.

B. REPLY TO TRUCK'S ARGUMENTS

1. **Century's Evidence, Offered in Opposition to Truck's Motion for Summary Judgment, Was Not Only Admissible, It Was a Necessary Element of the Cause of Action.**

Truck is wrong when it argues (Ans Br at 10) that Century's evidence was "inadmissible speculation." First, Truck conveniently forgets that all elements of Century's claim were supported by the expert witness testimony of John Partlow, an insurance executive with many decades of claims-handling experience. See Op Br at 26-28.

Second, recent case law makes clear that, where a plaintiff seeks to prove that certain action would have been taken that would have prevented the plaintiff from being damaged if the defendant had acted properly, the plaintiff must establish causation by offering testimony as to what that certain action would have been. See Van Buskirk v. Carey Canadian Mines, Ltd., 760 F2d 481, 492-93, 493 n 7 (3d Cir 1985), which further held that "assessing the credibility of plaintiffs' assertions is a matter left to the jury." 760 F2d at 493 n 7. See also Hoaglund v. Raymark Industries, Inc., 50 Wash App 360, 370-71, 749 P2d 164, 170-71 (1987) (quoting Van Buskirk v. Carey Canadian

Mines, Ltd. with approval); Mazur v. Merck & Co., Inc., 742 F Supp 239, 262 (ED Pa 1940). Thus, the very evidence which Truck attacks was not only appropriate, it was necessary.[2]

2. Truck's Tender of Its Limits Did Not Extinguish Its Contractual Duties.

Only by misconstruing the evidence, reading exhibits out of context, and misquoting the key language in the insurance policy, can Truck support its argument that it could unilaterally relieve itself of the promises it made in its insurance policy.

First the policy does not state that Truck "shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of liability has been *extended* . . . " as quoted in Ans Br at 13 (emphasis added). Rather, Truck's policy states that it is only relieved of its obligations after its limit of liability has been *exhausted* by payment of judgments or settlements. Policy Part I, ¶ 2 - CP 71, 326. This is a key distinction. It is true that Truck extended or tendered its policy limits post-verdict. However, such extension was not sufficient

---

[2] Truck is also wrong when it argues (Ans Br at 10) that statements regarding Fox's state of mind (as to what amount Fox would have accepted to settle the case) were inadmissible hearsay. It is well established that statements showing a person's state of mind are not hearsay and are admissible. See State v. Hamilton, 58 Wash App 229, 231-32, 792 P2d 176, 177-78 (1990).

to pay the judgment and it was not tendered as part of a settlement proposal or settlement agreement. No such proposal was pending at the time--largely because there had been no settlement negotiations. And, there had been no negotiations because Truck tied Century's hands by stubbornly refusing to release its policy limits at any time before the jury reached its verdict.

Truck misconstrues the evidence and refers to exhibits out of context when it argues that "Century's responsible officials . . . stated that Century expected [Truck] to tender its limits and the defense . . . ." (Op Br at 12-13). One of the supposed "responsible officials" was actually the insured's insurance broker, Ms. Arie Hupp of March & McLennan. CP 342. And she did nothing more than observe that if there was no appeal, and if Truck chose to proceed with payment of the judgment, then Truck's policy limits would be exhausted. There is really no dispute about that. That, however, did not happen.

The second letter (CP 341) likewise, merely recites what would happen if, per its policy, Truck exhausted its policy limits through payment of judgments or settlements. Again, however, that simply did not happen. Instead, Truck extended its policy limits and took the position that, by simply expressing its willingness to put its money on the table, it could be freed of its duty to defend. If that was the law,

then insurers could and should feel free to pay remaining policy limits at any time during litigation. Neither the law nor the insurance contract allows an insurer to leave its insured in the lurch in that manner. The reason is that the insured is not only entitled to its indemnity limits, the insured is also entitled to the cost of defending the claim.

As is pointed out in Op Br at 12-18, the insurer's duty to defend includes the duty to fund all post-judgment activity, including appeal. Truck breached this duty and should be required to reimburse Century for the damage caused by the breach.

Nor is Viking Ins. Co. v. Hill, 57 Wash App 341, 787 P2d 1385 (1990) to the contrary as suggested by Truck (Ans Br at 13-14). First, Truck is wrong when it asserts (Ans Br at 14) that the "policy language [is] similar to that here at issue." In Viking Ins. Co. v. Hill, the policy stated:

> However, we won't be obligated to pay for the cost of any further investigation or arrangement for settlement or to defend you further after we've paid our entire limit of liability for damages.

Thus, the quoted policy only required the insurer to pay its limits "for damages." Truck's policy, on the other hand, required the insurer to exhaust its limits by payment of judgments or settlements.

Neither of those events had occurred when Truck abandoned its insured.

Second, the Viking court acknowledged that an insurer's attempt to withdraw from the defense of an insured by depositing its limits into court "requires the insurer to act in good faith in the interest of the insured." 57 Wash App at 349. Here, there is no evidence that Truck had any interests other than its own in mind. Did it act in WECo's or Century's interests when it stopped payments to its retained defense counsel right at the time when counsel was recommending post-trial motions and an appeal? Clearly, Truck was motivated only by the well-being of its own pocketbook, not by what might be best for its insured.

Third, Viking Insurance Company satisfied its duty to defend by bargaining with its insured for the release of that duty. Id. at 351-352. Here, however, there was no such bargain and no such release. Truck simply walked away, leaving WECo and Century to clean up the mess it had created.

3. Aetna Ins. Co. v. Borrell-Bigby Elec. Co. Is on Point.

Truck strives mightily (Ans Br at 15-18) to distinguish Aetna Ins. Co. v. Borrell-Bigby Elec. Co., 541 So2d 139 (Fla App 1989), but ignores the eight other consistent "foreign" authorities cited by Century

on this same point. See Op Br at 16-17. Truck's criticism of Borrell-Bigby is misplaced. There, the court was faced with the same policy language as is contained in Truck's policy (contrast the language in Viking Ins. Co. v. Hill, supra, which Truck asserts is "similar" to Truck's policy). Further, in both cases, the primary insurer refused to follow up with a recommended appeal, and, in both cases, the primary insurer tried to free itself of its duty by tendering its policy limits into court, thus leaving the excess carrier to pursue post-trial relief. As a result, Century was required to incur $13,905.07 in defense costs which rightly should have been borne by Truck.

4-5. Equitable Subrogation Applies Under the Facts of This Case.

Truck made a rather novel, albeit successful, argument in the trial court which, in essence, amounted to arguing that it was entitled to summary judgment because no Washington appellate court had yet decided whether or not principles of equitable subrogation should be employed to allow an excess insurer to "stand in the shoes" of its insured for the purpose of pursuing a bad faith/negligence claim against a primary insurer. In other words, Truck's argument was that equitable subrogation does not apply in this type of case because the Washington appellate courts have not yet had the occasion to address

the issue (until now).

Contrary to Truck's assertion (Ans Br at 18), Century does not "concede that equitable subrogation is not a valid legal basis for a cause of action in Washington." Just as there is no case law expressly on point stating that equitable subrogation is available, there is no case law *prohibiting* application of the doctrine under appropriate circumstances. As is explained more fully in Op Br at 22-24, this is an appropriate case for this Court to recognize and apply the doctrine.

The vice of not providing an excess insurer any remedy against a primary insurer that has acted negligently or in bad faith is that it rewards the wrongdoer based upon the fortuity of the insured having had the foresight to purchase excess insurance. Under Washington law, in an otherwise identical situation, where the insured has no excess insurance, the insured is free to pursue a bad faith claim against the primary insurer. The question, then, should not be whether or not the primary insurer will be allowed to escape the consequences of its acts, but, rather, which device (equitable subrogation, direct duty, or both) this Court will adopt to allow the injured party to pursue relief.

Truck either misunderstands Century's discussion of the Washington authorities (Op Br at 19-22) which form the foundation for the natural extension of the law to allow an excess insurer to be

equitably subrogated to the insured's rights against the wrongdoing primary carrier, or it hopes that this Court will. For example, Century does not contend that Nyby v. Allied Fidelity Ins. Co., 42 Wash App 543, 548, 712 P2d 861, 865 (1986) affected the adoption of equitable subrogation in this state. Nor did Century so argue. The case is simply cited for the basic premise that one who is within the class of persons intended to be protected by insurance, not just the named insured, may bring an action against a primary carrier. This concept is consistent with the notion that an excess insurer may have such a right because excess insurers are within the class of persons who may be harmed if a primary insurer is negligent or acts in bad faith in the handling of a claim with excess exposure.

Similarly, Kagele v. Aetna Life and Cas. Co., 40 Wash App 194, 197, 698 P2d 90, 93 (1985) is cited for nothing more than the proposition that there is no prohibition against the assignment of a claim against an insurer. Thus, if an assignment as a matter of fact is not against public policy, is there any reason such an assignment cannot and should not be accomplished as a matter of law--such as when the real person injured by a primary insurer's bad faith claims handling is the excess insurer, rather than the insured. Under principles of equitable subrogation, an assignment in fact is not

required because equity holds that the excess insurer stands in the shoes of the insured.

Truck makes the argument (Ans Br at 20 and throughout its brief) that subrogation would not be equitable because WECo was "completely satisfied with its insurance carrier." As is pointed out on pages 7 and 8 of this brief, it takes quite a stretch to reach this conclusion from the record. In any event, it really misses the point. When an excess insurer, rather than the insured, is the one damaged by the primary carrier's mishandling of the claim, why shouldn't the insured profess "complete satisfaction"? It has not been damaged because the damage has been absorbed by the excess carrier. If Truck's point is worth examining at all, it should be scrutinized based upon the assumption that WECo, not Century, had to bear the burden of a $2.8 million dollar judgment and/or a $2.1 million settlement. If that were the case, would Truck be able to proclaim that its insured was "completely satisfied with its insurer"? Certainly not.

6. **Xenophobia Is Not A Good Basis Upon Which to Reject An Appropriate Legal Principle.**

Truck apparently is prepared to invite this Court to reject Century's appeal based upon the notion that Century relies on "foreign" cases. Indeed, Century has cited cases from Arizona,

California, Minnesota, Indiana, Michigan, South Dakota, Florida, Ohio, Oregon and Louisiana, all of which have adopted and applied equitable subrogation to allow a claim by an excess insurer against a primary insurer for damages caused by the primary carrier's negligence or bad faith. Op Br at 22-24. In response, Truck has failed to cite one case--domestic or foreign--where the doctrine was rejected.

The fact that a case is from out-of-state is not a reason to reject it. These cases are offered because they address an issue which this Court has not yet had an opportunity to consider. Truck is shortsighted if it truly believes that this Court, or any self-respecting court, would let xenophobic paranoia get in the way of the thoughtful consideration of new ideas.

7. Direct Duty--Another Approach

As with its discussion of equitable subrogation, Century has attempted to bring to the Court's attention cases from outside the state which have discussed and adopted the concept of a direct duty owed to the excess carrier by the primary carrier. Op Br at 25. As with the equitable subrogation issue, Truck persists in arguing that, since there is not yet a Washington appellate case on point, the legal theory must be a nonentity. If this sort of thinking prevailed in our courts, the common law would look just as it did several hundred years

ago. "Landmark" cases would not exist. The law would not develop and change with the times.

8. <u>There Are Genuine Issues of Material Fact As To Both Causation and Damages.</u>

If anything, this portion of Truck's brief (Ans Br at 25-27) makes clear that the trial court erred in granting Truck's motion for summary judgment. It is fundamental that a motion for summary judgment must be denied if there exists any genuine issue of material fact. With that thought in mind, it is worthwhile to scrutinize what Truck contends are the undisputed facts which entitled it to summary judgment.

Truck argues that there is no evidence that the case could have ever been settled for less than $3.5 million. Is this an undisputed fact? See, generally, Op Br at 26-45. In particular, it is worthwhile noting that Fox's lawyer, acting in his authorized, representative capacity, told Fox's banker that the case was likely to settle and that the case had a value in the low six figure range. Ex 18 - CP 251; Ex 99 - CP 284-90. This admission, coupled with Century's own evaluation of the claim and its reserve makes clear that the case could have been settled early on if Truck had not erected numerous barriers to settlement.

Similarly, Fox's other lawyer (who tried the case) indicated the

case could have been settled for $500,000 or less and that Fox never lowered his demand because Truck never approached Fox's trial lawyer about settlement. Tirdel Dep - CP 236-38.

The opportunities to settle were numerous. Early on, the case could have settled for $500,000 or less. Six months before trial it could have settled for $1,000,000, and similar opportunities existed while the trial itself was in progress. Considering that it was Truck's own intransigence that was the major factor hindering and inhibiting the settlement process, it seems a bit ironic that Truck may now actually become the beneficiary of its own stubbornness and neglect.

Truck argues that there is no evidence that a reasonable primary insurer would have taken the steps that would have led to a settlement in an amount substantially lower than the amount Century paid to extricate itself from the bind Truck created. Truck's argument does not square with the evidence.

For example, Truck's claims manager never sought authority to make an offer greater than the $20,000 local authority he had over all claims. Ex 147 - CP 309; Johnson Dep - CP 197. Nor did he ever offer any part of his $20,000 local authority. When plaintiff made his first settlement offer, Truck never even responded. Fox Dep - CP 162; Ex 93 - CP 276. Thus, Fox's first offer was the only offer. That is not,

as Truck suggests, evidence that the case could not be settled. Rather, it is evidence of stonewalling on Truck's part.

It is apparent from claims manager Chester's comments and writings that he decided, early on, that this case was going to be tried, regardless of the facts and regardless of defense counsel's frank, if less than rosy, evaluations. Attorney Tenney's letters are littered with such prophetic words as "dangerous case," "tremendous" and "astronomical" damages. Claims manager Chester's evaluations, on the other hand, had one common theme--the case would be tried.

If Century's burden is to demonstrate that the Fox case could have been settled for an amount equal to or less than the primary carrier's limits, then Truck is right--that was not demonstrated and it could not be because Truck's limits had eroded to such an extent that this claim could not have been settled without some contribution from the excess carrier. However, the fact is that Truck's unwillingness to release its limits to be used toward a settlement meant that no money could be offered and no settlement could be reached. See Hartford Ins. v. General Acc. Group Ins., 578 NYS2d 59 (1991), which held that the trial court erred in granting summary judgment to the defendant primary carrier, where there was evidence that the defendant negotiated in bad faith by not timely offering its policy limits, thereby

depriving the plaintiff excess carrier of an opportunity to negotiate a more favorable settlement.

There is substantial evidence in this record from which the jury could conclude that (1) the case could have been settled for an amount between $500,000 and $1,000,000 (see Op Br at 7-10); (2) Century was motivated to settle the case and would have contributed the amount necessary, in addition to Truck's underlying limits, to accomplish a settlement (see Op Br at 37-38); (3) Truck's steadfast refusal to release its limits was the causal factor which prevented such a settlement from coming together (see Op Br at 36-39); and (4) in so doing, Truck was motivated by a desire to protect its own interests at the expense of WECo and/or Century. See Op Br at 6-7. The existence of evidence supporting all of these elements entitles Century to a jury trial of its claims. The trial court erred when it ruled to the contrary and entered judgment in favor of Truck.

9-12. Century is Not Equitably Estopped.

Truck forgets that its obligations to its insured, or to an excess insurer, are the same whether the insured agrees with Truck's plan of action, disagrees, or is oblivious to it. Under each scenario, the primary insurer has the duty to act reasonably for the protection of its insured and not to put its own financial interests ahead of all others.

This duty of good faith and fair dealing, in fact, is the same whether or not there is any excess insurance in place.

Despite this broad, pervasive obligation on Truck's part, it persists in contending that Century's conduct, or lack of conduct, or level of conduct, absolves it of the legal obligations it undertook when it accepted the insured's premium dollars and entered into the policy of insurance. Truck has lost its focus. It is the one upon whom the obligation to act reasonably rested. And it is the one that has breached that obligation.

Truck argues (Ans Br at 30) that somehow Century or the insured induced it to "proceed[] to trial as it was bound to do." Nothing could be further from the truth. First, the policy of insurance gave it control over the defense. It was entitled to try or settle the case as it saw fit, limited only by the requirement that it act reasonably and that it not put its own interests ahead of its insured. Second, a review of the record makes clear that one person, and one person only, ordained that this case would go to trial. That person was Truck's claims manager Bob Chester. Ex 38 - CP 259; Ex 44 - CP 263-65; Ex 58 - CP 266; Op Br at 6-7.

Truck argues (Ans Br at 31-32) that Century "knowingly refused" to respond to Truck's equitable estoppel argument, and that

Truck detailed "all elements necessary to the defense" in its memorandum of law in support of its motion. In fact, the words "equitable estoppel" do not even appear in Truck's motion or in its memorandum in support of the motion. Nor did Truck plead equitable estoppel as an affirmative defense. Rather, Truck's attorney chose to raise that issue for the first time in his reply memorandum. Apparently pleased with this trick, counsel did the same thing at the motion hearing, raising estoppel in his reply argument only (RP 69), whereupon the trial court denied Century's counsel the opportunity to respond. RP 75-76.

Contrary to the implications in Truck's brief (Ans Br at 32-33) Century did object to the presentation of the judgment, to the extent it was based on Truck's unpled, unbriefed, unargued equitable estoppel defense. See Objection to Proposed Order Presented by Defendant. CP 44-46. The equitable estoppel defense was not properly before the court, should not have been a basis for the trial court's decision, and should not be a basis for this Court's resolution of this appeal.

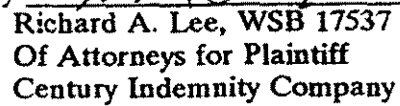
CONCLUSION

The trial court erred when it decided this case in Truck's favor based upon Truck's motion for summary judgment. There are genuine issues of material fact which create jury questions and are not

appropriate for summary disposition. This Court should reverse and remand so that Century may have its day in court.

Respectfully submitted,

BODYFELT MOUNT STROUP & CHAMBERLAIN



By ______________________
Richard A. Lee, WSB 17537
Of Attorneys for Plaintiff
Century Indemnity Company