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Patriot National Insurance Company: Case and Simulation

You are Chris Channing, the new claim manager of Patriot National Insurance Company's Omaha field office—a position you just took over from Dan Winter. (Winter was transferred from Omaha to a larger office in Cincinnati, where a claim manager had died unexpectedly.) For you, the placement in Omaha is a promising step in what has been a fast track career path with PNI. Over the past 6 years, you worked your way up from a claim representative, to field office supervisor, to a home office claim examiner. Field office claim manager was the next step. You anticipate that these next few years in the field are grooming for a higher position in the home office, perhaps as a regional or national director of claims. Your goal is to quickly establish an outstanding record as a field claim manager. (Your spouse didn't mind the move to Omaha while the kids are still in grammar school, but you would both rather be back in the home office area of Hartford, Conn., by the time they reach junior high school.)

In this new position, you are responsible for business decisions regarding which of the Omaha Field Office's liability claims are appropriate for out-of-court settlement and how they are handled. You are charged with seeing that the best settlement possible for PNI and its insured are negotiated, taking into account all of the broad factors of risk, cost, and benefit normally applicable in the insurance claims business.

You turned your attention to the Adler Auto claim file almost immediately upon your arrival in Omaha, because it was one of the 10 largest liability claims pending there. Dan Winter had spent a few days in transition with you, reviewing the history and current status of these significant liability claims as well as other field office issues.

The Adler Auto Claim File

The Adler Auto claim involves a lawsuit by Mrs. Barbara Torey against Adler Auto, Inc., an automobile dealer in Columbus, Nebraska, insured by PNI. The suit arose from a traffic accident on a rural highway in Nebraska in 1988. Barbara Torey, a young woman, was badly injured and has alleged that a proximate cause of the accident was faulty service on her car by Adler Auto.

This case exercise, based on an actual situation, was written by Senior Research Associate Marjorie Corman Aaron and Senior Lecturer John S. Hammond. It was prepared as the basis for class negotiation and discussion rather than to illustrate either effective or ineffective handling of the situation it describes.

The suit was filed in October 1990, just a few days before the two-year statute of limitations expired. In negotiations since then, the plaintiff's attorney has offered to settle the case for $300,000 and PNI has offered $25,000. The amount demanded in the legal complaint was $750,000. [A settlement number put out by the plaintiff is generally referred to as a "demand" and that by a defendant as an "offer."]

As plaintiff's counsel undoubtedly intended and PNI well knows, the plaintiff's $300,000 demand creates additional pressure on PNI because it is within the $300,000 limits of Adler's insurance policy. If the suit goes to trial, Adler Auto would stand to lose any amount over $300,000. Through his attorney, Adler put PNI on notice that he would sue PNI for his losses in that event, alleging "bad-faith" due to PNI's failure to settle within the policy limits. (When judgment is returned against an insurer on a claim of bad-faith failure to settle, there is a risk of punitive damages as well.)

Insurance companies are seeing a rise in such "bad-faith suits", and state decisions on an insurer's obligation in such circumstances are running strongly in favor of insureds. Plaintiff's counsel undoubtedly set this last demand just at $300,000 to put pressure on PNI—it is a tactic that indicates an experienced plaintiff's counsel.

You agree with Dan Winter's characterization of the Adler Auto claim as "vexing" when trying to assess an appropriate settlement figure. Though PNI's legal position was strong, as a practical matter it would be difficult to convince a jury not to rule in favor of the plaintiff out of sympathy for her. [The plaintiff has the burden of proof on liability. She can meet this burden if the jury finds a "preponderance of the evidence" in her favor.] The cost of preparing and trying the case would probably be at least $25,000. PNI has selected local attorney Fred Bogner to defend this case. His retention arrangement provides for rates of $125 an hour for legal work plus expenses. If the case goes to trial, Bogner will be paid a straight $1,000 a day. [Note that although Fred Bogner is selected and paid by PNI pursuant to its duty to defend Adler under the policy, Bogner legally represents Adler, not PNI.]

The Patriot National Insurance Company

Your employer, PNI, based in Hartford, Connecticut, is one of the 10 largest stock property and casualty companies in the United States. Its 1992 premiums were $3.9 billion. It has offices in 60 cities in the United States and Canada and with affiliates abroad. In 1992, its net income was a loss of $272 million before taxes, composed of $673 million in investment income and $845 million in underwriting losses. (PNI has a substantial investment portfolio for its insurance reserves, about 85% of which was invested in bonds and 15% in equities. Its portfolio return in 1992 was 8.3%. In 1991, it was unusually high at 14.7% due largely to good equity returns.) PNI has total assets approaching $50 billion. Commercial liability policies, of which Adler Auto's was an example, accounted for some $841 million in premiums in 1992.

The PNI Claim Department

The PNI Claim Department paid over 1,079,000 claims totaling $3.6 billion in 1992. Its claims vary greatly in size. In 1992, 68% or 720,011 were for amounts less than $1,000 each and accounted for $233 million. Another $795 million was paid to those 3,700 claims with settlements greater than $100,000 each. The remainder were claims between $1,000 and $100,000. In addition to claims paid, the cost of operating the department and purchased services (including $143.7 million for outside legal work) was $490,196,000. PNI classifies claims according to insurance coverage and type of claim as follows: workers' compensation, property, auto damage, and liability (including automobile bodily injury claims, such as that arising from Mrs. Torey's suit).

The initial report of an auto liability claim is typically to an insurance agent, who in turn notifies one of PNI's 60 field offices. Virtually all claims are handled by those offices. Each office has a claim manager, several claim supervisors, a group of adjusters (or "claim reps"), and clerical personnel. Approximately 75% of the claims are small, routine, and handled by an in-office adjuster over the phone or by correspondence. The remainder are handled by PNI field adjusters, non-PNI private independent adjusters (for claims distant from PNI offices), or by legal counsel if litigation is involved.

Whenever PNI receives notice of suit having been filed, as in the Adler Auto affair, it is immediately assigned to an attorney. If staff attorneys are not available, as in this case, attorneys are picked from lists of approved attorneys in each locale, referred to as panel counsel.

Large cases usually warrant considerable investigation, conducted by PNI personnel. In the Adler Auto case, however, because of the delayed notice of the claim, the panel counsel obtained the police reports and interviewed investigating officers, witnesses, and mechanics who worked on Mrs. Torey's car.

Company policy requires a claim supervisor, within 30 days after initial notification, to estimate the amount for which the case would be settled. This amount is treated as the amount of loss for accounting purposes until modified or until the claim is actually settled. Regulatory authorities require that a part of PNI's assets be earmarked for settling the case. If additional information substantially alters the estimated settlement amount, such reserves are modified accordingly. The estimate first set in the Adler Auto case when the suit was brought was $30,000, exclusive of expenses. Expenses such as attorney's fees are payable by the PNI in addition to the policy limits.

Field offices have complete autonomy in settling certain claims. However, if a reserve of over $300,000 has been established, or if a case carries a possibility of an award exceeding $300,000 and is going to trial, notification of the home office is required. If the exposure is at least $300,000, then a duplicate file is maintained at the home office where claim examiners follow the case and give direction and advice.

The company's philosophy is to "settle every just claim promptly and fairly"—to pay what it's worth—no more, no less. If settlement is directly with the claimant, efforts are made to move quickly and reasonably to avoid an attorney getting involved. When the claimant is represented by a lawyer, the situation is treated as more adversarial. If a proper settlement is not achieved through negotiation or use of alternative dispute resolution (processes such as mediation or arbitration), PNI is willing to take cases to trial based on their merits. In general, less than 5% of litigated claims actually go to trial.

The performance of claim personnel is evaluated regularly through a structured review process. The review criteria include: the degree to which proper judgment is exercised about insurance coverage applying to the claim, promptness and thoroughness of investigation, accuracy of setting estimates, ability to recover paid amounts from other responsible parties through subrogation, early disposition of claims, indemnity payment actually made, and ability to control expenses. Because of the large variability in outcomes, performance evaluation is not done on the basis of individual cases, but instead by reviewing a large number of files. For example, one PNI claim manager has observed, "If you give two good claim reps 20 files on which to establish estimates, they may differ considerably on some, but the total amount for all files ought to be reasonably close." PNI expects a good claim rep to be aggressive, to be on top of his or her files all the time, to be a self-starter, and to have initiative and imagination.

While this is the formal performance evaluation process, there is an informal one that weighs heavily on claim people who take high exposure cases to trial. If the trial outcome is a defense verdict or a reasonable award, the claim person is thought to have done his or her job. However, if an unusually high jury award comes in, he or she is often second-guessed. In extreme cases, field office

claim people have been flown to the home office in Hartford to explain to superiors why the trial results were so poor.

The Adler Auto Claim File - Detailed Case Review

Obviously, to evaluate the Adler claim for settlement purposes and to create a settlement strategy, it is critical that you be completely familiar with the facts of the case. With that in mind, you first reviewed a memorandum you asked a senior claim rep to prepare summarizing what appear to be the basic, undisputed facts in the case. That memorandum contained the following overview:

The Accident

Barbara Torey, a housewife, was 19 years old at the time of the accident. She married Mr. Torey soon after graduating from high school and has been a housewife with no children since then. Her claim arose as a result of a collision with a car driven by Harold Conway. The facts about the accident, as indicated in the legal record, were the following:

From October 21 to October 28, 1988, Mrs. Torey's 1986 Olds Omega four-door sedan was in the Adler Auto dealership shop for $1,250 worth of repairs. It appeared from a deposition and affidavits that a case could be made in court that the defendant's mechanics failed to reconnect the left front headlight.

[The rules of civil litigation mandate a process referred to a "discovery," in which the parties formally exchange relevant case information. A deposition is a means of discovery in which witnesses are questioned by counsel and their testimony is recorded, under oath but outside of court. Deposition testimony may be used to cross-examine a witness at trial and may be admissible into evidence for witnesses unavailable at trial. Affidavits are written statements signed under oath, sometimes admissible at trial or court hearing.]

At about 4 p.m. on October 28, Mrs. Torey and her husband picked up the automobile from the garage in Columbus. (See map, **Exhibit 1**, for location of towns.) They immediately drove to Wayne, Nebraska, to return the automobile they borrowed from friends while theirs was being repaired. Mrs. Torey drove their car and her husband followed in the borrowed automobile. They visited in Wayne until about 6:30 p.m. and then started their return trip to their home in Schuyler, with Mrs. Torey driving. Their trip was southward over Nebraska Route 15, a two-lane concrete highway connecting Wayne to Schuyler. Traffic was heavy, and it was a misty, rainy evening with poor visibility. The Toreys have stated that they were unaware that the left headlight was not operating.

At about 7 p.m., after it was completely dark, Mrs. Torey passed an automobile driven by Dick Goldman, and thereafter both the Torey vehicle and the Goldman vehicle passed a semi-tractor trailer truck being driven by Dirk Hoven. Both Hoven and Goldman stated in affidavits that the left headlight on the Toreys' automobile was not operating. Mrs. Torey drove behind a second truck at a speed of about 45 miles per hour and at a distance of approximately two car lengths or 36 feet. It also appeared that the rear wheels of the truck were kicking up a heavy spray. According to Mrs. Torey's deposition, corroborated by affidavits of Goldman and of a passenger in his car, Mrs. Torey edged over into the left traffic lane, or "peeked out," to see if it was possible to pass the truck, but returned to the right lane behind the truck when she saw traffic coming from the opposite direction. When the traffic had passed, she again "peeked out" to see if it was possible to pass, and in doing so edged into the left lane a distance of one to two feet. While the automobile was in this position (for a time Mrs. Torey estimated to be two seconds), she collided head-on with a car coming from the opposite

direction, driven by Harold Conway. (See **Exhibit 2** for a diagram of the accident.) The point of impact was at the left headlight of each vehicle. In Mrs. Torey's deposition, she also stated that she had not seen the lights of the Conway vehicle until just before impact, when it was even with the truck.

Conway testified on deposition that the night was dark and rainy; that visibility was "practically nil"; that he was driving his car at about 40 miles per hour entirely within the northbound lane of traffic (in his proper lane), and that the impact occurred about two feet on his side of the center line of the road. He also stated that he first saw Mrs. Torey's vehicle when he was 30 to 40 feet from it, at a time when he was about even with the truck, and that he noted the Torey car did not have a left headlight. He first saw the illuminated right headlight. When asked to state the time interval between the first sighting of Mrs. Torey's automobile and the collision, he replied: "Seconds, but I don't know." He later stated that it would be "something like that" when asked if he concurred with Mrs. Torey's estimate of two seconds. Conway was also asked if he had an opportunity to avoid the collision. He responded: "Well, I think at the last second when I saw the car, I tried to head for the ditch, but I don't think I got over very far before the impact." He stated that if the left headlight had been operating, he would have seen the vehicle sooner and would have had time to veer his car to avoid the collision. The road at the scene of the crash was straight and the topography was almost flat.

The defendants, Adler Auto (owned by Ed Adler) and its employee Ken Kane (alleged to have conducted the repairs on the car), were covered by a PNI Company Garage Keepers' Liability policy for the period September 3, 1988 to September 3, 1989. For an annual premium of $17,221, Adler Auto received various coverages, including up to $300,000 per incident for bodily injury caused by faulty repairs. In addition, the policy afforded legal expenses for defense, without limit. Beyond the policy limits of liability, Adler is responsible for its own excess liability.

According to the suit, "Barbara Torey sustained serious injury to and loss of vision in the left eye, serious and permanent disfigurement from facial laceration and scarring, a comminuted [shattering] fracture of the right ankle and dislocations, damage to the soft tissues and nerves in various portion of her body . . . . [She] has endured pain and suffering and will all her life endure pain and suffering because of said injuries and their consequences . . . . Her ability to pursue her usual and ordinary activities and to earn money has been and will be seriously affected and diminished . . .[and] . . .she will require future medical attention and treatment.

"WHEREFORE, Plaintiff, Barbara Torey, prays damages against defendant, Adler Auto, Inc., a Corporation, and Kenneth Kane, in the amount of $750,000 and demands that issues herein joined be tried by jury."

History of the Investigation, Legal Action, and the Negotiations

You then conducted a more in depth review of the file and gleaned the following chronological summary of more than three years of activities between the filing of the suit and February, 1993.

[You recognize that each party would have amassed several thick files in the investigation, formal discovery, and negotiation of this case. All of the information on the facts of the case and the relevant witness would be obtainable from a painstaking review of either side's files, although not all of the information would have entered the files at the same time. For example, PNI representatives and/or the plaintiff's counsel or a hired investigator would have interviewed certain witnesses. Some of these interview reports might have been turned over in discovery; some of the witnesses would have been subject to later deposition and essentially recounted the same information as provided in

their interview. Information relating to the credibility and import of a witness's testimony would have been gathered and perhaps been the subject of discussion in negotiations or during breaks in a deposition. Thus, as you consider your analysis of the case, you must recognize that the plaintiff's counsel's analysis will be based upon the same information.

The only statement reflected in your files and in the following chronology that would not be available to the plaintiff's counsel are PNI's internal notes and evaluations of the case and, for the most part, correspondence and notes reflecting communication with counsel.] To facilitate keeping track of the names of the parties, please refer to **Exhibit 3**.

October 28, 1988 Date of the accident.

October 27, 1990 Suit was brought against Adler Auto and Kenneth Kane by Barbara Torey in the 13th Judicial Circuit of Nebraska. Robin L. Townsend, partner in Byrnes, Byrnes & Townsend of Fremont, Nebraska, is plaintiff's attorney. Adler Auto learned about it on the radio.

November 5, 1990 Adler Auto's insurance agent notified PNI of the suit. PNI had been unaware of the accident prior to receiving this notice.

November 7, 1990 Peter R. Laurence, Claim supervisor of PNI Omaha field office, assigned to the file and contacted Plaintiff's counsel, Robin Townsend.

November 11, 1990 Fred Bogner, Norfolk Nebraska, filed an appearance as defense counsel on the court docket in the case, upon notification of his selection by PNI. [When an attorney undertakes representation of a client in pending litigation, he or she must "file an appearance" with the court, indicating that representation. This provides notification to all that an attorney is counsel of record, and must be provided official notice and copies of certain documents as the litigation proceeds.]

November 12, 1990 A letter to Ed Adler at Adler Auto told him of the selection of Bogner as defense counsel. Adler Auto was also advised that since the amount demanded in the complaint was $750,000, far exceeding the $300,000 policy limit, he may wish to retain additional counsel on his own behalf and at his own expense. (The letter noted that even if the amount stated in a legal complaint may be exaggerated and may not reflect a "real demand", it did appear that the plaintiff might seek an amount in excess of the policy limits in this case.) Adler Auto was also informed that PNI was investigating the file under a "reservation of rights" [PNI was reserving its legal right to deny coverage] due to the lateness of reporting the accident.

November 17, 1990 PNI received a copy of the Nebraska State Highway Patrol's accident report, sent by plaintiff's counsel. Both sides also ordered (and later obtained) copies of the photographs taken of the vehicles.

November 18, 1990 Delores C. Murray, Attorney, of Columbus, Nebraska, wrote a letter to PNI indicating that she would represent Adler Auto for the amount exceeding coverage and filed an appearance as counsel for Adler Auto on the court docket in the case. Attorney Murray requested that PNI withdraw its reservation of rights, stating that Adler Auto called his agent immediately after hearing of suit.

By separate letter, Attorney Murray also requested that PNI provide defense for Kenneth Kane (the mechanic reported to have worked on Mrs. Torey's car), to which PNI agreed.

(In view of the size of the claim, the seriousness of Mrs. Torey's injuries, and PNI's reservation of rights, Ed Adler's decision to retain his own counsel was not surprising. It does create some additional pressure for PNI, which must consider the insured's potential "bad-faith" claim.)

December 3, 1990 Kenneth Kane was notified that PNI would provide a defense for him. Fred Bogner confirmed to all counsel that his defense would include Mr. Kane.

December 5, 1990 An investigator (hired by Fred Bogner with the approval of PNI) interviewed Kenneth Kane at Jack Bozak Buick, Schuyler, Nebraska, with a court stenographer who made a transcript. A man in his 30's with a neatly shaven beard, Kane had worked in the body shop for 10 years, repairing approximately 15 cars per week. Kane stated that he only "*vaguely*" remembers the client vehicle. He remembered it because of an old hole in the right rear fender that was apparently put there by a snow tire chain. Kane did not remember the front damage or any repairs that were done on the car at Adler Auto. He was polite and appeared to be answering questions to the best of his ability. During the recorded interview, the PNI investigator noted that Kane's difficulty remembering the client vehicle two years later was understandable.

December 8, 1990 The Circuit Judge issued an order to both sides to produce any transcripts, reports, memoranda, or photographs surrounding the investigation of the accident within 28 days.

December 18, 1990 The PNI investigator reported difficulty contacting witnesses who had moved.

January 12, 1991 Dick Goldman was interviewed by a PNI investigator (and later by plaintiff's counsel). Goldman's car was passed by Mrs. Torey shortly before the accident. Mr. Goldman spoke well and consistently. It was acknowledged by both sides that he would make a good witness. Mr. Goldman stated that they were passed by Mrs. Torey when they were driving 50–55 mph. PNI stated its position that the area of the accident has a 55 mph speed limit reduced to 40 mph—probably because of a vision problem.

January 30 – February 10, 1991 Fred Bogner and plaintiff's counsel, Robin Townsend, conferred informally regarding the whereabouts of the truck driver, Mr. Hoven, in Illinois. Counsel agreed that they would both like to depose Hoven. Bogner agreed that PNI would undertake efforts to locate him and would keep Townsend informed. However, PNI's initial efforts to contact Hoven were unsuccessful.

February 26, 1991 Fred Bogner received material produced for court by plaintiff's attorney. This material included a statement by Hoven, the truck driver. The statement was viewed as helpful by PNI and potentially damaging by the plaintiff, particularly on the question of causal connection. Hoven's statement indicated he would testify that the plaintiff's headlight was off and was 'peeking' out so that the oncoming traffic would not have a warning that the plaintiff was pulling out to pass.

March 11, 1991 – April 15, 1991 During his defense of a deposition of Ed Adler, Bogner questioned whether the automobile involved in the accident in this case was actually picked up on October 28, 1988. Apparently, Adler Auto's business practice to make a bank deposit about 1:00 p.m. each day, and any deposits received after that time were held over to the next day. October 28, 1988, was a Monday. Bogner's line of questioning attempted to establish that the car could conceivably have been picked up Friday, the 25th, or Saturday, the 26th.

During a follow-on deposition of Kenneth Kane, Mr. Kane testified that the work shown on the estimate would not have required him to take out or disconnect the headlights. The so-called "headlight door" listed on the estimate was simply the chromium frame that is on the front of the headlight and is held in place by two screws. From the booking of the work as shown on the back of the estimate sheet, Mr. Kane's work on the car appeared to have been completed on October 23, 1988.

After the repair, the car was turned over to a Darwin Baker for painting. (Mr. Baker was later deposed at length. He testified that, unlike Mr. Kane, he never saved his booking sheets and did not remember the car in question. From the description of the work as given in the estimate, Mr. Baker said that the painting would not have taken more than one-half day. Thus, based on the fact that Mr.

Kane's work was completed on October 23, 1988, PNI's counsel made the point that the Torey vehicle would have been ready for delivery long before 3:00 p.m. on October 28, 1988.)

According to Mr. Baker, the estimate of repairs for the car in question was made by an Al Molder, who had since moved to the Maple Chevrolet agency in Council Bluffs, IA.

PNI's investigator spoke with Mr. Molder on the telephone but did not conduct an interview. (Both counsel understood that PNI would seek to interview and/or depose Mr. Molder and show him a copy of the estimate of repairs and the bill marked paid to "refresh his recollection." Obviously, it would be to PNI's advantage to show that the vehicle was in the plaintiff's possession prior to Monday, October 28, 1988.)

Photographs secured from Dawkins Studio showed the left front and side of the Torey vehicle to be completely demolished, making it impossible to ascertain whether or not the left headlight had been disconnected before the accident.

May 8, 1991 Certain information was received by both sides on a third-party document subpoena from Aetna, insurer of Harold Conway. It revealed that Aetna had sought and received payment on Conway's collision claim from Cornhusker Motor Club, Barbara Torey's insurer. (Aetna's personal injury file could not be found.) Among the documents provided was a witness statement from Goldman, whose car Mrs. Torey passed before accident. This statement indicated that the speed of Mrs. Torey's car prior to accident was about 60 mph. In conversation with attorney Townsend, Fred Bogner noted that he viewed the information as critical, because of PNI's view that the speed limit was 40 mph in the area of the accident.

June 1, 1991 PNI reported on continuing efforts to locate Dirk Hoven. While evidence pointed to Florida or Ohio, he had not yet been found.

June 5, 1991 Answers to interrogatories [formal questions submitted by each side to the other in the discovery process] were filed with Circuit Court.

June 29, 1991 Al Molder, former body shop manager at Adler Auto was deposed. He testified that he remembered the Torey car because it was not well maintained. He recalled being on vacation the week the car was in the shop, and he believed it was picked up before he returned. Further, he stated that it would be unusual for a car with so little damage to remain in the shop over a weekend, and thus it was unlikely that it was actually picked up on Monday, October 28. He also stated that it would be unnecessary to disconnect the headlight while replacing the headlight door.

November 9, 1991 The case was continued to March 1992, to allow time to take additional depositions. Plaintiff's attorney promised a settlement demand at the time of deposition.

December 21, 1991 Bogner took the depositions of Mr. and Mrs. Torey. (The Toreys had moved to Tucson for family reasons. They were flown from Tucson to Nebraska at PNI's expense.) In his deposition, Fred Torey couldn't recall whether it was dark or twilight at the time of the accident. Mrs. Torey states she was able to see the back of the semi-trailer truck before attempting to pass it. After the deposition, both sides acknowledged that Mrs. Torey, a small woman, would present a sympathetic appearance to a jury. The plaintiff's attorney did not make any settlement demand.

January 28, 1992 The court clerk's office notified counsel to prepare for a trial date in early May.

March 14, 1992 PNI's counsel, Fred Bogner, received a letter from Robin Townsend, plaintiff's attorney, offering to settle for $300,000. (The letter is reproduced as **Exhibit 4**.)

Shortly thereafter, Attorney Delores Murray sent a registered letter to Bogner stating: "In view of the terrible injuries of Barbara Torey, I think that the demand of the plaintiff to settle this case for $300,000 is an eminently reasonable demand. I am afraid that if you deny that offer, it will be withdrawn, thus exposing Adler Auto to serious liability over and above his policy limits. I urge you and the Patriot National Insurance Co. to give immediate consideration to Attorney Townsend's offer. Please keep me informed." Fred Bogner noted that Ms. Murray's letter was "not unexpected."

March 26, 1992 Defendants filed a motion for summary judgment, resulting in postponement of the trial to October or November. [A motion for summary judgment is appropriately granted against a plaintiff if, based upon facts she alleges, no legal basis for the claim is found. Granting summary judgment ends the case unless the summary judgment is successfully appealed.]

Counsel for both sides conducted some jury verdict research confirming the fact that small, rural Stanton County, in which the case would be tried, is a "conservative jurisdiction." The largest verdict ever returned by a jury was for $400,000, about three years ago. The plaintiff was the sheriff of Stanton, who had serious injuries, fractures, etc., but continued in office. The next largest verdict in the county was for $250,000 a few years ago.

June 12, 1992 Attorney Murray wrote to Bogner urging prompt disposal of the matter. She stated that the lawsuit was interfering with Adler Auto' ability to plan and get financing for his business.

July 6, 1992 The liability claim file against Mrs. Torey was obtained from her insurance company and later exchanged in discovery. The only relevant information it contained was that her insurance company had settled with Conway for $20,000. The insurance company apparently considered the case to be one of clear liability and did not bother to depose anyone except the Toreys before making an out-of-court settlement. (Mr. Torey in his deposition said his wife was attempting to pass the truck at the time of the accident.)

August 30, 1992 Illinois Credit Bureau traced Dirk Hoven to a penitentiary where he was serving an indefinite term for burglary. Although both sides were notified, neither elected to take a formal or informal statement from Mr. Hoven.

September 11, 1992 Mary Ludwig, passenger in Conway's car, was deposed. She testified: "After the accident, the next thing I remember was waking up in the hospital next to Mrs. Torey. I heard her say over and over that she was afraid that she was going to die and that she was sorry she tried to pass the truck and that she had hit the car. The sheriff told my sister who told me that there was a car behind the Torey car with two young men in it who said that Mrs. Torey had passed them 'hell-bent for election' [Nebraska slang for 'very fast'] and had been behind a truck and had let only one car pass (which was the car next in front of the Conway car) before she attempted to pass the truck. I feel Mrs. Torey could see us before we could see her."

October 20, 1992 When Fred Bogner informed Attorney Murray of a planned offer of $25,000 to the plaintiff, Murray expressed his opinion that offer was woefully inadequate.

December 29, 1992 Defendants' motion for a summary judgment was granted.

January 28, 1993 Plaintiff appealed the court's granting of summary judgment.

February 1, 1993 Bogner offered $25,000 in settlement to the plaintiff in the context of an extended session with Robin Townsend. Townsend agreed to submit the offer to the plaintiff, but with a negative recommendation. Townsend promised to get back to Bogner with the plaintiff's response to the settlement offer but did not do so.

The Injuries

Although the parties do not agree entirely on the seriousness of Mrs. Torey's injuries, the development of a description of these injuries and identification of areas of dispute have been much more straightforward than on the issue of liability. Mrs. Torey's injuries and the parties' respective positions regarding those injuries are summarized as follows:

(1) Serious damage to her left eye, resulting in at least 60% loss of vision: while the exterior of the eye has healed fairly well and the injury is not noticeable from a distance, the eye's tracking patterns are a bit off and the pupil dilates more slowly than normal. Mrs. Torey claims that she is unable to do close work such as sewing or work at a computer for long periods of time without suffering severe headaches. Thus, she alleges that the eye injury has limited her earning capacity. She reports self-consciousness about the eye's appearance, and consequent difficulty interacting with people at close range. While acknowledging the significance of any eye injury, the defense takes the position that there is no demonstrable impact on earning capacity or enjoyment. Mrs. Torey is able to drive and go about her normal daily activities. The defense notes that the eye's exterior is without scarring or redness and that variations in its tracking and dilation patterns are so subtle as to be easily overlooked, even at close range. Finally, the defense notes that Mrs. Torey had been described as a "shy person" before the accident.

(2) Facial bruises and lacerations: anyone would agree that photographs taken of Mrs. Torey's shortly after the accident showed frightening facial bruises and cuts. In fact, however, Mrs. Torey's face healed very well. The only permanent, large scars that remain are within $^1/_2$" of the hairline, easily covered by Mrs. Torey's hair. Mrs. Torey takes the position that the scars near her hairline are ugly and disfiguring. To cover them, she must wear her hair in a certain way. She claims to be self-conscious about these scars when at the beach and in private moments.

(3) Comminuted (shattering) fracture of the right ankle: Mrs. Torey's ankle required rather extensive surgery, involving the insertion of four pins to hold the shattered bone in place. Three of the pins were removed after the initial surgery, but one remains permanently. Mrs. Torey reports difficulty standing on her right foot for long periods and claims that she is unable to jog or participate in recreational sports such as skiing and volleyball. She claims that this a permanent change in the quality of her life and earning capacity. While her surgeon states that she had an excellent medical result, and has recommended therapy to improve strength in her leg, he notes concern about possible early onset of arthritis. He also concurs that the leg may ache in cold and damp weather and that Mrs. Torey has been advised to cut back on strenuous athletic activities in the near future, as she experiences discomfort. The "Independent Medical Examiner" (IME) retained by the defense reported that Mrs. Torey had an excellent medical result, with full range of motion in the leg. He also noted that she had no documented record of athleticism prior to the accident and that the leg should not interfere with earning capacity.

(4) Neck and back strain: Mrs. Torey complained of neck and back pain, which were characterized by her physician as soft tissue injuries resulting from the force of the accident. For six months, Mrs. Torey followed a prescribed routine of rest and light physical therapy. Her medical records contain no reference to neck or back problems from approximately a year after the accident until eighteen months ago, when she saw her doctor about an "unbearable flare-up of back pain" (as reflected in his notes). The medical records contain intermittent references to back complaints since then. Mrs. Torey maintains that her neck and back pain continued from the time of the accident. This is not corroborated by any medical records because the condition initially improved and "there didn't seem to be any point in bothering the doctor when it wasn't too bad." However, she states that "it never

really went away and became much worse eighteen months ago, after I tried to do some spring housecleaning." Mrs. Torey claims she "is flat on her back at least a day or two a month" and experiences "pain in daily activities such as vacuuming and carrying groceries." The defense takes the position, as was concluded by its IME, that any neck or back problems caused by the accident were completely resolved within the first year. Mrs. Torey injured her back eighteen months ago moving some heavy boxes during spring cleaning (as reflected in the emergency room notes). The defense states that this was not caused by the accident.

Mrs. Torey's total medical expenses were approximately $30,000 at the time the suit was brought.

Assessments of Possible Trial Outcomes

In preparation for a discussion of possible settlement of this case, you have gathered information on and considered the evaluations and analysis of various people involved to date.

You were frankly surprised although certainly pleased by the court's decision to grant the defense motion for summary judgment in this case. PNI's counsel has acknowledged that it is highly unusual for summary judgment to be granted where, as in this case, the trial will involve disputed issues of fact. You would agree privately that the plaintiff's appeal of the judgment is likely to be successful. That is why PNI continued to talk settlement.

Assuming that summary judgment will be reversed, the defense might well prevail at trial due to some strong legal and factual arguments its favor. On the other hand, you would acknowledge the possibility that jury sympathy could lead to a plaintiff's verdict on liability.

Based upon your experience in the bodily injury claim litigation, you know that counsel apply a rule of thumb to roughly predict that jury verdicts come in at a multiple of the "specials" or "special damages." Specials are considered to be medical and other expenses and lost earnings in a simple case. (While earning capacity is supposed to be considered, information about earning history may be heavily weighted by some juries.) The judge will instruct the jury that an amount for general damages — pain and suffering, disfigurement, permanency — is not subject to mathematical calculation according to formula but is to be determined based upon what is fair and reasonable under the circumstances. Notwithstanding the formal instruction, some attorneys estimate awards at 3 times specials, others at 5 times specials, depending upon the area of the state or the country and an attorney's predilection, personality, and/or experience. Most would acknowledge a wide range, depending upon the particulars of the case, the sympathy generated for the plaintiff, and/or enmity for the defendant during the trial. In cases involving horrifying and severely debilitating injuries, a verdict might be as high as 10 time specials or more. Most counsel would also recognize a phenomenon known as "jury compromise"—where uncertain on the liability issue, juries may consciously or subconsciously "slice" from what would otherwise have been a very generous verdict for a highly sympathetic plaintiff.

Clearly, as is true for many cases of this type, prediction of the likely outcome and thus the appraisal of the Adler Auto claim are highly subjective.

Attorney Townsend's letter of March 12, 1992 contained some number estimates of likely verdict ranges that were either unrealistically aggressive or should be cause for worry for PNI. The question is: which one? On that issue, shortly after receipt of Townsend's letter, Mr. Bogner stated, "Attorney Townsend's comments as to the possible verdict range are, at best, speculations. Stanton County is a small rural county. The largest verdict ever returned by a jury was for $400,000, about three years ago. The plaintiff was the sheriff of Stanton, who had serious injuries, fractures, etc., but

continued in office. The next largest verdict in the county was for $250,000 a few years ago. I have also learned that the plaintiff's attorney has never tried a case in Stanton County. I did not say this to demean Townsend, whom I have found to be capable in cases we have had together in the past. " Mr. Bogner went on to say that because of the seriousness of the injuries and sympathy factor, not because of legal factors, "a serious effort should be made to settle the case and a substantial offer should be made." However, according to Bogner, the plaintiff's settlement demand should not be taken seriously.

Henry Brink, claim supervisor of the Omaha field office (who took over the file from Peter Laurence) noted in March, 1992, that "if the case were one of clear liability, a verdict in the order of $250,000 to $300,000 would be possible."

Consistent with your analysis, PNI's people were quite pessimistic about the chances of the summary judgment's withstanding appeal. Thus, at the end of 1992, Attorney Bogner noted that the file "is still a dangerous one in spite of summary judgment."

You note that PNI's internal file contains a letter from Dan Shea, the home office claim manager on the file. In December, 1992, Shea wrote to Brink expressing concern about the delay in submitting the file and the company's degree of exposure. He asked a number of questions regarding the legal background, noted that the attorney has been paid for extensive research of the law, and asked for an up-to-date opinion on possible jury settlements and his reasons therefore. He concluded, "It is my opinion that our estimate is extremely low. Obviously, I am taking a rather pessimistic outlook on our success in being able to count on keeping the summary judgment. If the Court of Appeals upholds the summary judgment, that will be the end of it. On the other hand, if the court reverses the lower court and if this has to go to a jury, we will want to reconsider the estimate."

The Players to Date

In order to evaluate the various opinions and actions by counsel and by PNI's personnel, you have carefully reviewed and observed their characteristics, background, and experience. You have come to know the following:

Fred Bogner: Representing PNI is Fred Bogner, a 60-year-old defense lawyer in Norfolk, Madison County, well known and well regarded as a trial attorney. Bogner had been known as a tough prosecutor and was an elected state's attorney for the county many years ago. A native of the Norfolk area, Bogner is better known by the bar of Stanton County (the location of the accident and potential trial) than is the plaintiff's attorney. Bogner's firm is the only one in Madison County which has represented PNI over the years. Bogner specializes in personal injury cases, but would only rarely see a case of this size. More typically, Bogner's cases have settlement values well under $50,000, and he has an excellent record in either settling or trying them.

Bogner is about 5 feet, 8 inches tall, gray haired, and wears glasses. He is known for conducting affairs above board, using a low-key, soft-sell style. Sometimes described as hard-nosed, when pushed hard, Bogner's tough streak emerges. He is a staunch Republican, as are most people in this rural area.

Bogner appears to be very pessimistic about the chances of early settlement or a favorable jury award in this particular case. You are not sure how much weight to give his opinion. On the one hand, he is your defense counsel. On the other hand, Dan Winter has noted that, in his opinion, defense lawyers don't like to try cases that they consider to have a substantial chance of unfavorable awards, so as not to run the risk of spoiling their records. This may make defense counsel unduly risk-averse—inclined to exaggerate the downside.

Dan Winter, the claim manager of PNI's Omaha field office until a very recent transfer to Cincinnati, is 41 years old, and has spent 18 years with PNI. A college graduate, Winter is 5 feet, 10 inches tall, slender, and looks a great deal like the local folk. He projects honesty. Mr. Winter is not as smooth or as practiced a negotiator as Fred Bogner. Instead, he is more abrasive and more obviously hard-nosed; his tough streak shows immediately.

Winter's experience has been more in settling property claims than casualty claims. The former type of claim tends to be more objective in as much as the cost of replacing or repairing an item is more easily and accurately determinable. On the other hand, "fair" settlements for liability claims is highly subjective, and one needs a good sense of "poker" in settling them.

Winter has had a more optimistic view of what the case is "worth" than others in his office or than Mr. Bogner. On the other hand, he did warn you that a very large jury award could come if the case is ultimately tried in 1993 or afterward. The appeal on the summary judgment will be decided before the end of the year, but Winter suggested that the case be settled beforehand if possible.

Henry Brink, who is claim supervisor in the Omaha field office, worked for Mr. Winter. He took over the file in late 1991 from Peter Laurence. He is 47 years old, trained as a lawyer, and has been 23 years with PNI. He started his career in Des Moines and has been in Omaha for 18 years. Brink has a reputation as hard-working but easy on subordinates. He is not a delegator, and he is not aggressive. He has an independent source of income to supplement his PNI salary and consequently is uninterested in relocating, which limits the opportunities for advancement. He has a fine home in nearby Fremont. His performance appraisal is due shortly, and in light of the company's focus on balancing payments made on settlements or trial awards and legal expenses, you assume he wants to demonstrate that he has done his part.

You know very little about Ed Adler's private counsel, *Delores Murray*, in as much as you have not previously dealt with her. Your primary contact with her has been through the letters you have received.

The plaintiff's lawyer, *Robin L. Townsend*, also lives in Fremont and practices law there. The town is about 40 miles northwest of Omaha. Townsend would be described as "late 40's," of ordinary appearance. Described by some defense counsel as "egotistical" or "self-centered", Townsend is well-liked among the plaintiff's bar and is a popular, flamboyant speaker at area service clubs (e.g., Rotary, Lions). Townsend's firm, Byrnes, Byrnes & Townsend, has not had any previous dealings with PNI. The firm's founding partner, Mr. Byrnes, Sr., is in his late 60's and a respected member of the local legal community.

This appears to be largest case that Townsend has ever had. Townsend may understandably want to try the case, get a big verdict, and enhance Townsend's and the firm's name and practice.

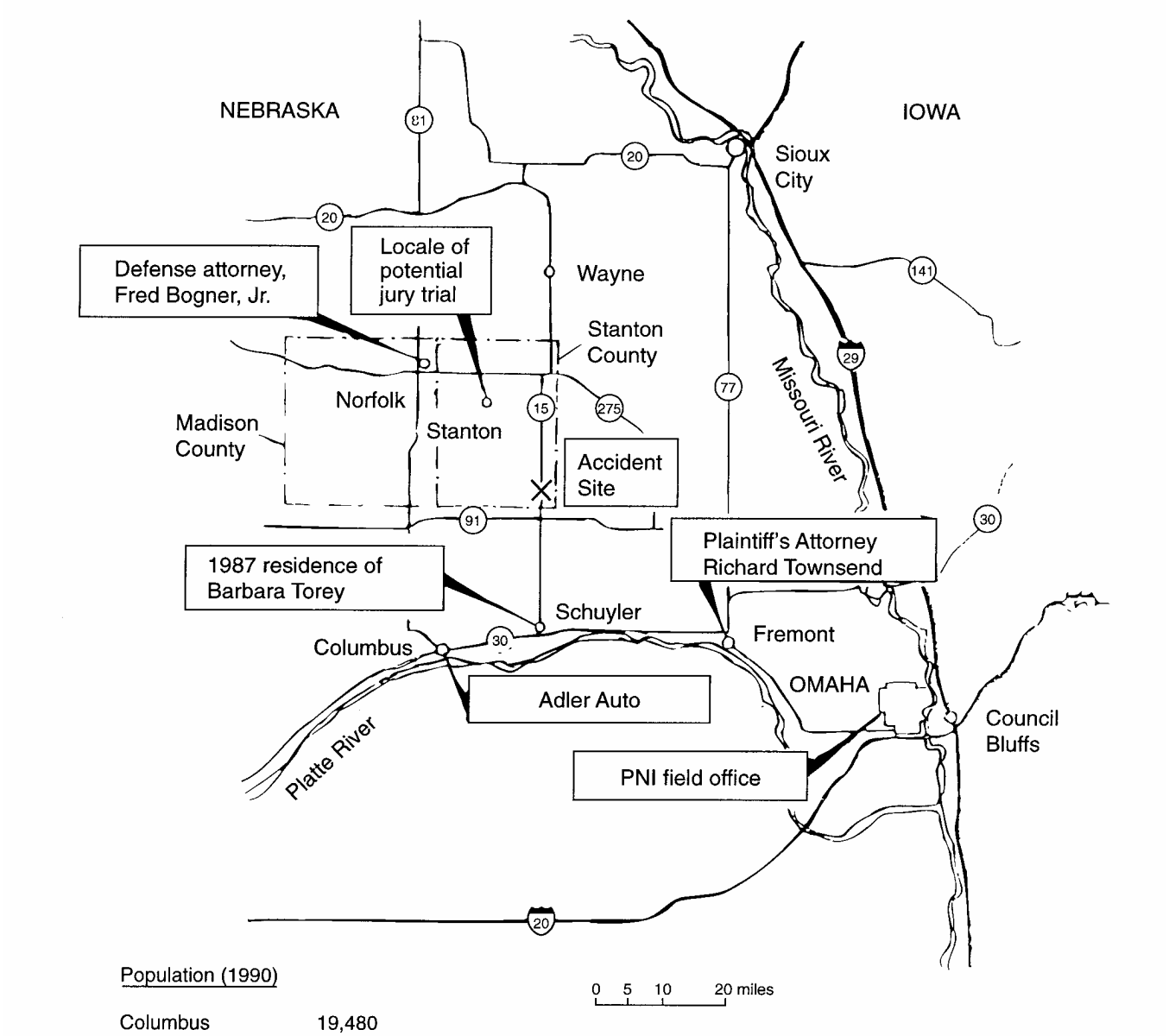
It is no secret that Townsend has taken the Torey case on a contingency basis, as would most plaintiff's counsel. It is common knowledge that contingency fees generally range from one-third to 40% of any settlement. It would not be unusual for Townsend to have advanced moneys to cover expenses in preparing this case. (These can be estimated at approximately $7,500 – $15,000.) If they lose at trial, the Toreys are technically liable for this amount. However, Townsend would be unlikely to recover much, if any, of that.

You are somewhat concerned about Townsend's incentives. According to Dan Winter, Townsend may view this trial as "a once-in-a-lifetime opportunity," and not be inclined to settle for "short money." If it is potentially the largest case Townsend has ever handled, Townsend may want to use it as a reputation enhancer. On the other hand, Townsend will forfeit the value of time spent (and most likely, out of pocket expenses) if the defense prevails. You assume that Townsend's firm has put in time and expenses approximately equal to those of defense counsel to date and would

have to invest equivalent time in preparation and presentation of trial. As of March, 1992, defense counsel Bogner had submitted a bill for services from November 1990 for $11,460, of which $2,146 was out-of-pocket expenses. Your attorney has estimated his additional future fees going forward at $25,000 for trial, trial preparation and written and oral arguments on appeal of the summary judgment decision, plus approximately $7,000 in expenses (for transcripts, experts and the like). Of the $25,000 in estimated fees, approximately $10,000 would be spent preparing for the summary judgment (which would entail only a negligable amount of additional expenses; the $15,000 balance and virtually all the additional expenses would be required for the trial). In short, your cost to trial going forward is likely to be $32,000 in fees and expenses, in addition to the $11,460 already paid. (Of course, if the summary judgment decision stands, there would be no trial expense.)

It is now the winter of 1993. No further settlement offers or demands have been made. You have decided to spend some time reviewing the file and the facts and consider your strategy before attempting to negotiate a settlement of this case.

Exhibit 1 Map Showing Relationship Among the Towns Mentioned in the Case



Population (1990)

Columbus	19,480
Fremont	23,680
Norfolk	21,476
Omaha (metro.)	343,400
Schuyler	4,330
Stanton (county seat)	6,244

Exhibit 2 Diagram of the Accident

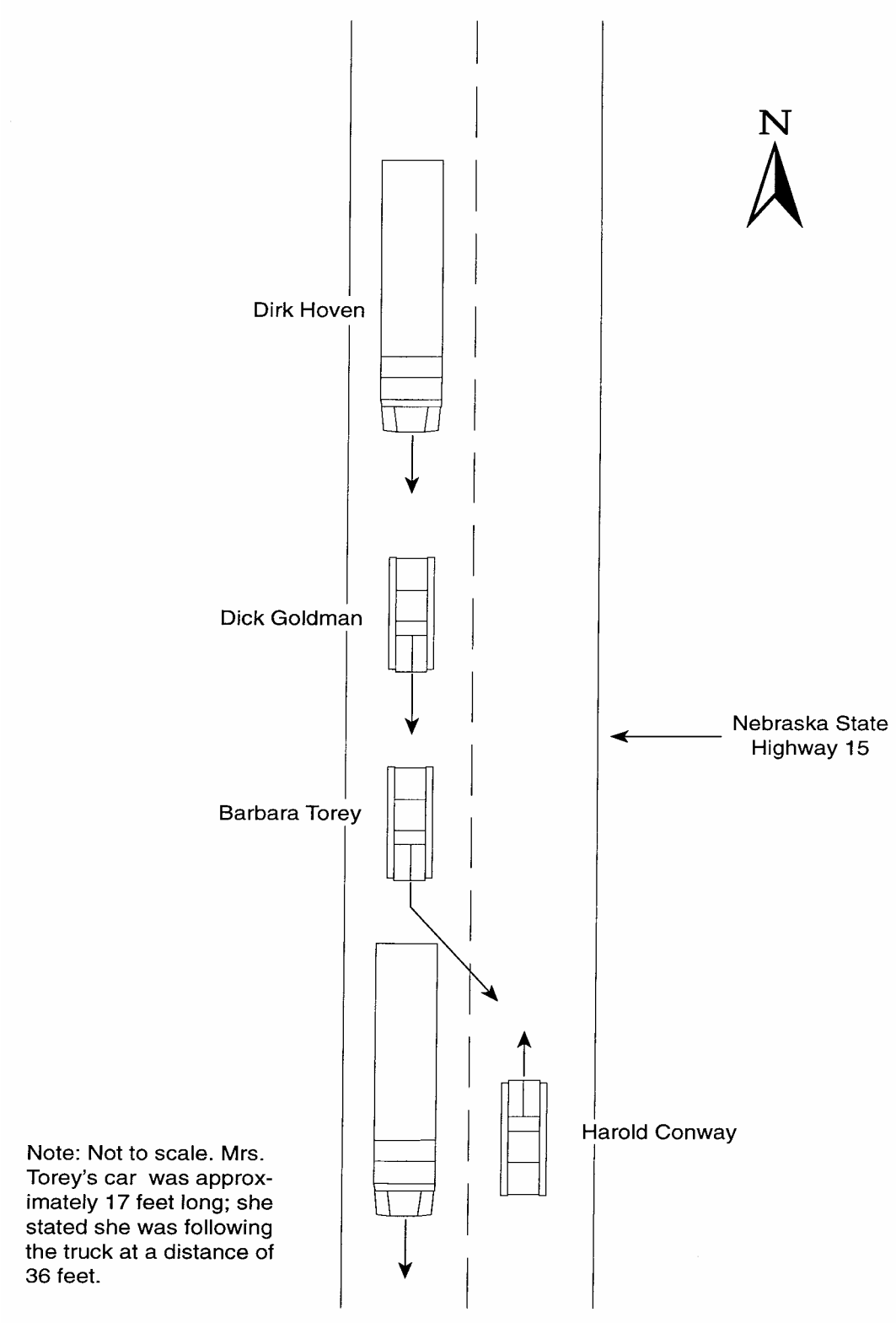


Exhibit 3 The Cast of Characters

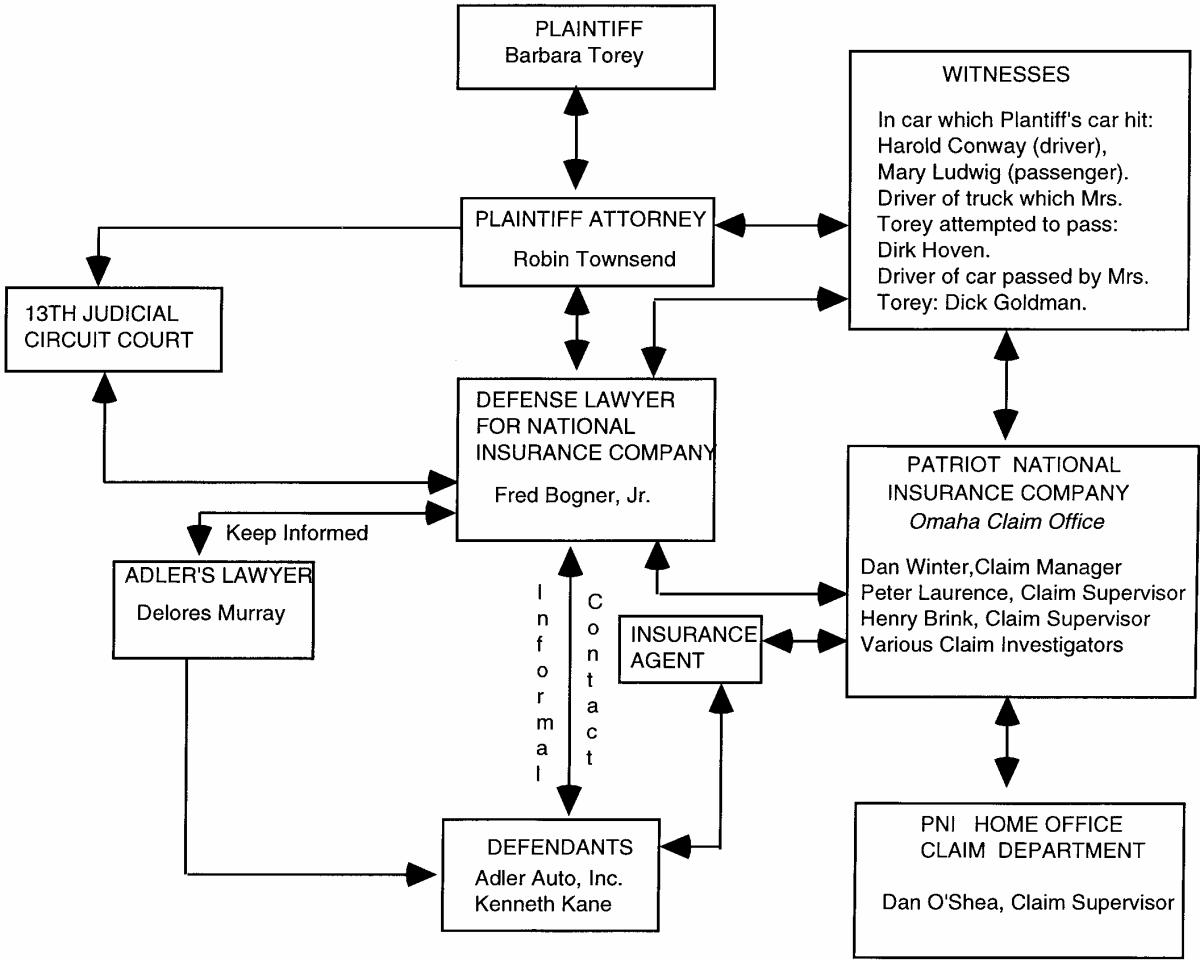


Exhibit 4

BYRNES, BYRNES & TOWNSEND
ATTORNEYS AT LAW
157 East Military Avenue
Fremont, Nebraska 68025

Harold Byrnes, Esq.
Harold Byrnes, Jr., Esq.
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March 12, 1992

Mr. Fred H. Bogner, Jr.
Attorney At Law
257 North Avenue
Norfolk, Nebraska 68701

Re: Torey v. Adler Auto

Dear Fred:

After your several inquiries regarding a settlement demand to be made by the Plaintiff in this case, I have reviewed the file and come to the following personal conclusions:

1. I think we are going to win this lawsuit. I recognize the fact as well that there is a possibility of losing this lawsuit; however, I think the chances are much better of winning than losing. I think there is no question but that the case will be submitted to the jury for decision on liability.

2. I think it is apparent in this case that the injuries will have a tremendous impact on the jury.

3. I tried to project the minimum or maximum limits on a jury award that I think will be made in this case and frankly, I envisioned the lowest possible award (and really this considers a compromise as far as liability is concerned) to be $350,000. I think it is likely that the jury would return a verdict in the amount of the prayer for damages which is $750,000. I think it is very probable the jury would return a verdict in the approximate amount of $375,000 to $450,000.

4. I am aware of the fact that the Defendant, Adler Auto, Inc., has liability coverage with the Patriot National Insurance Company in the amount of only $300,000. While I think the settlement value of this case is above that $300,000 figure, I will at this time on behalf of the Plaintiffs offer to settle this case for the insurance limits available; that is, $300,000, reserving the right to withdraw this offer at any time.

I would appreciate your consideration and response.

Very truly yours,

Robin L. Townsend, Esq.

Instructions

You have been assigned the role of Claim Manager of the Omaha office of Patriot National Insurance Company. You will negotiate an out-of-court settlement of a suit filed against your insured, Adler Auto by Barbara Torey. Mrs. Torey was badly injured in an automobile accident five years earlier and alleges that a proximate cause of the accident was faulty repair on her car by Adler Auto.

You will negotiate with Mrs. Torey's attorney, Robin Townsend, a partner in Byrnes, Byrnes and Townsend (BB&T) who filed the suit. (Normally when there is a lawsuit, lawyers talk to the other side through its lawyers, rather than directly. To do otherwise is considered "unethical." However in the insurance industry, it is common practice for nonlawyer insurance personnel to negotiate directly with plaintiff attorneys.)

You have full authority to settle on behalf of Mrs. Torey at any amount you consider acceptable.

The raw score used to compute your Z-score will be based on the present value of your settlement if you reach agreement. If you deadlock it will be based on either:

1. The actual trial outcome including legal expenses if in fact the case was actually tried *or*

2. If the case was actually settled out of court—and we are carefully ***not*** telling you whether the case did settle or not—your score will be based on a random draw (separate for each Patriot player) from a judgmental probability distribution of the financial outcome of a trial, adjusted for legal costs, assessed by a very experienced expert.

Name:_____

PRE-NEGOTIATION QUESTIONS
(PATRIOT NATIONAL INSURANCE COMPANY)

Question 1: What is your assessment of the probability that the Plaintiff, Mrs. Torey, will win the lawsuit if it goes to court?_____

Question 2: Additionally, if it goes to court and she does win, what damages do you expect the jury will award?_____

POST NEGOTIATION QUESTIONS

Did you reach agreement?

Yes_____ (Please answer Question 1.)
No _____ (Please answer Question 2.)

1. Settlement:_____ (in thousands of dollars)

2. Final offer Patriot:_____ (in thousands of dollars)
   Final offer BB&T:_____ (in thousands of dollars)