



**Domestic Claims, Inc.  
Excess Claims**

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March 18, 2005

**VIA CERTIFIED MAIL No. 7002 2030 0003 8558 8164**

M. Frederick Pritzker, Esq.  
Brown Rudnick Berlack Israels  
One Financial Center  
Boston, MA 02111

**RE: Insured : Building Material Corp. of America, d/b/a GAF Corporation**  
**Claimant : Marcia Rhodes, et. al.**  
**Date of Loss : January 9, 2002**  
**Our File # : 169-151612**

Dear Mr. Pritzker:

AIG Domestic Claims, Inc., ("AIGDC") formerly known as AIG Technical Services, Inc. ("AIGTS") is the claims administrator on behalf of the National Union Fire Insurance Company of Pittsburgh, Pa., ("National Union"). We write at this time in response to your letter of February 18, 2005 directed to AIGTS, which relates to the claims made against Building Materials Corporation of America d/b/a GAF Materials Corporation ("GAF"), Driver Logistics Services ("DLS") and Carlo Zalewski by your clients, Marcia and Harold Rhodes, and their daughter Rebecca Rhodes.

You have taken the position, on behalf of your clients, that AIGTS as the claims administrator for National Union, the excess insurer (above a policy issued by Zurich) of GAF, DLS and Mr. Zalewski, failed to make a prompt, fair and equitable settlement with your clients and that it has violated the Massachusetts Consumer and Business Protection Act. In brief, AIGDC believes that at all times, it and AIGTS have acted in a prompt, fair and equitable manner with respect to your clients' claims against GAF, DLS and Mr. Zalewski. AIGDC hereby incorporates by reference the response of AIGTS on behalf of National Union to your letter of November 19, 2004.

With reference to this matter, National Union provided GAF with commercial umbrella liability coverage under policy number BE 3574068. This policy was in excess of a Commercial General Liability/Auto policy issued by Zurich. As you recall, immediately before the April 1, 2004 Pretrial Conference, Zurich offered its policy limit of \$2,000,000 which your clients rejected without a counter proposal. At that time your clients maintained a settlement demand of \$15,000,000. After this offer was made, and coverage under the National Union policy became potentially applicable, AIGTS cooperated promptly in moving this case into mediation.

During the trial of this case in Norfolk County Superior Court, settlement negotiations continued. At the conclusion of testimony, I personally extended to the Plaintiffs, through you, and in the presence of defense attorney Russell X. Pollock, Esq., an offer of \$6,000,000, to settle the claims against all of the defendants, in addition to the \$550,000 already received from the settlement with Third-Party Defendant McMillan's Tree Removal. No response to that offer was made, and indeed Plaintiffs' demand never went below more than \$11,000,000, exclusive of the \$550,000.

In your February 18, 2005 letter, you stated that the liability of GAF, DLS and Mr. Zalewski was "reasonably clear" as of the date of Mrs. Rhodes's accident on January 9, 2002. Investigation into the accident however, revealed that McMillan's, which was in control of the worksite, failed to place traffic signs to warn motorists such as Mr. Zalewski. This omission, which is undisputed by the plaintiffs, was in direct violation of an ordinance, 454 CMR 10.47. Thus, while plaintiffs claim liability was reasonably clear, which party may or may not have been liable and if so for what part of the damages was subject to reasonable dispute.

Further, The National Union policy, by its terms, does not contemplate National Union offering to pay any money nor does it require a defense to the insured, until the primary insurer has exhausted its policy limits. The National Union policy states, in pertinent part:

#### **I. Coverage**

We will pay on behalf of the **Insured** those sums in excess of the Retained Limit that the **Insured** becomes legally obligated to pay by reason of liability imposed by law or assumed by the **Insured** under an insured contract because of **Bodily Injury, Property Damage, Personal Injury or Advertising Injury** that takes place during the Policy Period and is caused by an **Occurrence** happening anywhere in the world. The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.

#### **II. Defense**

A. We shall have the right and duty to defend any claim or suit seeking damages covered by the terms and conditions of this policy when:

1. The applicable Limits of Insurance of the underlying policies listed in the Schedule of Underlying Insurance and the Limits of Insurance of any other underlying insurance providing coverage to the **Insured** have been exhausted by payment of claims to which this policy applies.

#### **III. Limits of Insurance**

#### E. RETAINED LIMIT

We will be liable only for that portion of damages in excess of the **Insured's** Retained Limit which is defined as the greater of either:

1. The total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and the applicable limits of any other underlying insurance providing coverage to the **Insured**; or
2. The amount stated in the Declarations as Self Insured Retention as a result of any one **Occurrence** not covered by the underlying policies listed in the Schedule of Underlying Insurance nor by any other underlying insurance providing coverage to the **Insured**.

\* \* \*

With respect to damages, the adequacy of an insurer's offer of settlement is not judged by the ultimate verdict, but is judged against the facts as they appeared prior to trial. For example, GAF engaged a highly qualified independent expert, Ms. Jane Mattson, to review the scope and cost of Mrs. Rhodes' Life Care Plan as developed by Ms. Adele Pollard the life-care planner retained by the plaintiffs. Ms. Mattson gave the opinion that Ms. Pollard's Life Care Plan overstated costs by approximately \$1,000,000. AIGTS relied upon the opinions of Ms. Mattson and other experts in evaluating your clients' claim for settlement, and it was entirely proper for it to do so.

Given that you are calling into question AIGDC's effort's on behalf of National Union, to resolve this case, the reasonableness of your clients' demands must also be discussed. Your clients' initial demand was \$16,500,000, and the demand *increased* to \$19,500,000 by the time of the mediation. In fact, prior to trial the lowest demand your clients made was \$15,000,000, which is 60% or \$5,600,000 higher than the eventual jury verdict. These settlement demands were primarily based on non-economic damages rather than economic damages; the economic damages alleged by plaintiffs were enumerated at approximately \$3,000,000. As discussed above, GAF's independent life care expert significantly disputed the scope and extent of the future economic damages.

Further, we note your clients were unwilling to produce key medical records. Mrs. Rhodes claimed prior to trial, and at trial, that her injuries have caused significant psychological trauma such as anxiety and depression. Some of the medication she had been prescribed and (according to her life care plan) will continue to be prescribed into the future are designed to treat psychological complaints. Mrs. Rhodes apparently had a variety of psychological conditions prior to the accident, such as bipolar disorder and attention deficit disorder/hyperactivity disorder, and had been on Lithium. Yet the records for this treatment were not provided to the defendants, to allow them to properly evaluate Mrs. Rhodes's claim. As you know, GAF has challenged the Court's refusal to allow discovery on this issue, and an appeal has been filed on this and other grounds.

M. Frederick Pritzker, Esq.

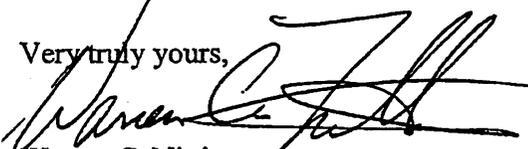
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Notwithstanding the foregoing, and GAF's appeal in this case, AIGDC continues to be interested in coming to an appropriate resolution of this matter. As you will recall, on January 21, 2005, I traveled to your offices in Boston in an attempt to settle this matter. At that time, we extended (and still hold open), a further offer of settlement in the amount of \$7,000,000 to resolve all claims including the most recent claim that you have presented.\* (This offer included the \$2,000,000 in primary limits of the underlying policy, which we understand have since been paid to you.) Of this amount, \$1,250,000 will be structured to purchase a life care plan on behalf of Mrs. Rhodes, yielding a projected benefit to age seventy (70) of \$3,452,333. In light of your recent letter, any settlement must cover all claims against all the defendants, as well as National Union AIGDC and AIGTS, and must cover all other claims which might arise pursuant to Massachusetts General Laws c. 93A and c. 176D. We remain, as always, prepared to continue settlement negotiations, and would welcome the opportunity to return once again to Boston to resume discussions on this matter further with you at a mutually convenient time.

Very truly yours,



Warren C. Nitti  
Complex Director

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\* You will recall that at the January 21 meeting in Boston, you refused to negotiate any further from AIG Domestic Claims, Inc.'s offer of \$7,000,000, terming that offer a "non-starter".