



AIG Technical Services, Inc.

**AIG Technical Services, Inc.**

EXCESS SPECIALTY CLAIMS DEPARTMENT

175 Water Street, 22<sup>nd</sup> Floor

New York, NY 10038

Phone: (212) 458-5782 Fax: (212) 458-5680

e-mail: [warren.nitti@aig.com](mailto:warren.nitti@aig.com)

December 17, 2004

**VIA CERTIFIED MAIL No. 7002 2030 0003 7773 0885**

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:

As you may know, AIG Technical Services, Inc., is the claims administrator on behalf of the National Union Fire Insurance Company of Pittsburgh, Pa., ("National Union") a member company of the AIG Group ("AIG"). We write at this time in response to your letter of November 19, 2004 directed both to Zurich American Insurance Company ("Zurich") and National Union, which letter 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 Zurich and AIG, as the insurers of GAF, DLS and Mr. Zalewski failed to make a prompt, fair and equitable settlement with your clients and that they have violated the Massachusetts Consumer and Business Protection Act. Solely as regards the allegations against AIG, we respectfully disagree. In brief, AIG believes that at all times it has acted in a prompt, fair and equitable manner with respect to your clients' claims against GAF, DLS and Mr. Zalewski.

With reference to this matter, National Union provided GAF commercial umbrella liability coverage under policy number BE 3574068. This policy was excess of a Commercial General Liability/Auto policy issued by Zurich. In May, 2004, Zurich offered its policy limit of \$2,000,000 which your clients rejected without a counter proposal; at that time your clients maintained an unreasonable settlement demand of \$15,000,000. After this offer was made, and coverage under the National Union policy became potentially applicable, AIG cooperated promptly in moving this case into mediation. During this mediation, which was conducted before Thomas Porter, Esq. on August 11, 2004, an offer of \$3,500,000 was made on behalf of GAF, DLS and Mr. Zalewski, which was in addition to the \$550,000 offered by Third-Party Defendant Jerry McMillan's Professional Tree Service, Inc. ("McMillan's"). That \$550,000



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offered by McMillan's was accepted by your clients, meaning that they had a total package of just over \$4,000,000 offered to them. At no time during the mediation did your clients reduce their demand below \$15,000,000, which is 60% higher than the ultimate verdict in their favor.

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 their counsel, and in the presence of defense attorney Russell Pollock, Esq., an offer of \$6,000,000, to settle the claim against all the defendants, in addition to the \$550,000 already received from the settlement with McMillan's. 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 November 19, 2004 letter, you state 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. You claim that the accident happened at a highly visible worksite and that Mr. Zalewski was clearly negligent for failing to stop in time to avoid this accident. Once again, we disagree. Investigation into the accident 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 was in direct violation of an ordinance, 454 CMR 10.47, and at the very least contributed heavily to the accident.

Further, under established Massachusetts case law, an excess insurer such as National Union "has no obligation or incentive to make an explicit commitment [to settle] until the primary insurer has acted." Clegg v. Butler, 424 Mass 413, 421, 676 N.E.2d 1134, 1141 (1997). In this case, Zurich did not offer its policy limits until April, 2004. Accordingly, National Union had no obligation to make any offer or movement towards settlement before that time. The only time period in question with respect to National Union, was from Zurich's offer in April, 2004 through August, 2004. During that time period, AIG, at its own expense, retained a second law firm on behalf of the insured, conducted further investigation into both liability and damages, (including the deposition of Mrs. Rhodes, which had not been undertaken beforehand) and spearheaded the effort to get the case to mediation.

\* \* \*

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. Wendy Cummings, to review the scope (and therefore the cost) of Mrs. Rhodes' Life Care Plan as developed by Ms. Adele Pollard the life-care planner retained by the plaintiffs. Ms. Cummings gave the opinion that Ms. Pollard's Life Care Plan overstated costs by approximately \$1,000,000. AIG relied upon the opinions of this and other experts in evaluating your clients' claim for settlement, and it was entirely proper for it to do so.



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However, if the adequacy of an insurer's offer of settlement is to be judged by the ultimate verdict, then the reasonableness of your clients' demands and the likelihood of a reasonable settlement prior to trial must be judged by the same standard. 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 were enumerated at approximately \$3,000,000. As discussed above even these economic damage figures were questionable and, according to GAF's expert, were overstated by \$1,000,000.

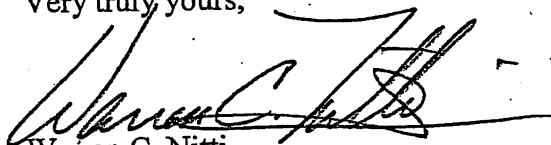
Further, we note your clients were less than forthcoming with key medical records. Mrs. Rhodes claimed prior to trial, and at trial, that her injuries have caused significant psychological trauma such as anxiety and depression. Some of the medication she has been prescribed and (according to her Life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

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. However, the specific failure to disclose key records, is further evidence that the jury verdict herein is not an appropriate measure of the adequacy of AIG's offer of settlement.

\* \* \*

Notwithstanding the foregoing, and GAF's appeal in this case, AIG is in fact interested in continuing to resolve this matter. As such, we propose a further offer of settlement in the amount of \$7,000,000, \$1,250,000 of which 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. <sup>1</sup> In light of your recent letter, any settlement must cover all claims against all the defendants, as well as any other which might arise pursuant to Massachusetts General Laws c. 93A and c. 176D. We remain, as always, prepared to continue settlement negotiations herein, and would welcome the opportunity to discuss this further with you in Boston at a mutually convenient time.

Very truly yours,



Warren C. Nitti  
Complex Director

<sup>1</sup> Please see the enclosed settlement structure. The total offer includes the \$2,000,000 limit of Zurich's primary policy. Zurich has ignored my repeated attempts to contact it to discuss this issue, and AIGTS can only assume that Zurich is still willing to offer its full limits herein.



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CC: Claims Department  
Zurich American Insurance Company  
1400 American Lane  
Schaumburg, IL 60196-1056  
**VIA CERTIFIED MAIL No. 7002 2030 0003 7773 0892**



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## SETTLEMENT PROPOSAL

Marcia Rhodes  
Date of Birth: June 22, 1955  
Normal Life Expectancy: 33 Years

	<u>Cost</u>	<u>Guaranteed Benefits</u>	<u>Projected Benefits</u>
<b><u>Section I - Future Lifetime Income</u></b>			
\$4,315.61 per month for the life of Marcia Rhodes, guaranteed 17 years, beginning on April 15, 2005, increasing at 3 % compounding annually. Compounding benefits will begin on April 15, 2006. The last guaranteed payment will be March 15, 2022.	\$987,292.35	\$1,126,974.31	\$2,852,333.79
<b><u>Section II - Future Lump Sums</u></b>			
\$100,000 guaranteed lump sum payable on June 22, 2015. (Age 60)	\$63,026.53	\$100,000.00	\$100,000.00
\$200,000 guaranteed lump sum payable on June 22, 2020. (Age 65)	\$93,248.94	\$200,000.00	\$200,000.00
\$300,000 guaranteed lump sum payable on June 22, 2025. (Age 70)	\$106,432.18	\$300,000.00	\$300,000.00
<b>TOTAL</b>	<b><u>\$1,250,000.00</u></b>	<b><u>\$1,726,974.31</u></b>	<b><u>\$3,452,333.79</u></b>

This proposal is valid until December 24, 2004.

:AMGEN  
December 17, 2004

Prepared By: EPS Settlements Group, Inc.