4/27/2006

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT

MARCIA RHODES, HAROLD RHODES, Individually and on Behalf of His Minor Child and Next Friend, REBECCA RHODES,

Plaintiffs,

v.

AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL SERVICES, INC., NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

No.: 05-1360- BLS2 (Gants, J.)

AIGDC AND NATIONAL UNION'S[1] OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND FOR SANCTIONS

Stripped of its hyperbole, Plaintiffs' motion seeks production of documents specifically identified on the AIGDC/NU privilege log which fall into four separate categories:

1. Documents generated by Zurich and its claim administrator, Crawford, which have been produced in redacted form;
2. Written communications between and among the AIGDC, its counsel, and coverage counsel for their insured;
3. Specific AIGDC Excess Claim Notes that reflect attorney-client communications, attorney work product, and opinion work product of one AIGDC claim professional that does not pertain to the timing or amount of settlement offers made to Plaintiffs; and
4. Documents relating to National Union's reinsurance relationship.

[1] This opposition adopts the short-hand identifiers utilized in Plaintiffs' motion (*i.e.*, AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. is collectively referred to as "AIGDC"; National Union Fire Insurance Company of Pittsburgh, PA is referred to as "National Union"; Zurich American Insurance Company is referred to as "Zurich"; the captioned plaintiffs are collectively referred to as "Plaintiffs"; and Crawford & Company is referred to as "Crawford").

AIGDC has articulated its respective bases for withholding these categories of documents as follows:

1. ***Zurich*** has objected to the production of materials generated by Zurich and Crawford on the bases of the work product and the joint defense protections against disclosure. Plaintiffs' fight over this information is with Zurich, not AIGDC. If this Court overrules Zurich's objection, AIGDC will produce its copies of the documents in un-redacted form.

2. The Court's Order of January 23, 2006, upheld the applicability of the joint defense/common interest protection from disclosure to documents reflecting communications made in the underlying litigation between and among the insurers, their counsel, and coverage counsel for the insured.

3. To the extent the Excess Claim Notes that AIGDC has not produced reflect attorney-client communications and/or **attorney** work product, this Court has previously determined that they need not be produced. To the extent they reflect opinion work product of AIGDC claim representatives which does not concern "the timing or the amount of settlement offers made to the plaintiffs," they are beyond the scope of this Court's Order of January 23, 2006, which sought to strike a reasoned balance between Plaintiffs' evidentiary needs and proper deference to the protection to be accorded to opinion work product.

4. Reinsurance information is neither relevant nor reasonably likely to lead to the discovery of admissible evidence. AIGDC's claim representatives have testified that the availability of reinsurance had no bearing on the handling of Plaintiffs' underlying claim.

As more fully explained below, AIGDC has fully complied with its discovery obligations and Plaintiffs' motion should be denied.

Argument

I. PLAINTIFFS ARE NOT ENTITLED TO THE ADDITIONAL DOCUMENTS THAT THEY SEEK FROM AIGDC AND NATIONAL UNION.

A. Plaintiffs' Dispute Over the Production of Zurich/Crawford Documents Is With Zurich, Not AIGDC.

Plaintiffs' misstate AIGDC's reason for producing only redacted copies of certain documents prepared by Zurich and Crawford claims representatives. To illustrate, with respect

to "a July 1, 2003 facsimile from David McIntosh, claims supervisor for Zurich, to Crawford's claims manager," Plaintiffs suggest that "AIGDC claims that this fax is protected as work product and under the common interest privilege." (Plaintiffs' memorandum, p. 12.) While the document may be protected for these reasons, **this is Zurich's assertion, not AIGDC's.**

Plaintiffs similarly attack AIGDC based upon their contention that "AIGDC has adopted Zurich's theory" that the redacted information in documents prepared by Crawford and McIntosh constitutes opinion work product protected from disclosure. (Plaintiffs' memorandum, p. 8.) Again, while these materials certainly appear to be protected from disclosure for the reasons asserted by Zurich, AIGDC has made it clear that it does not take any position on the subject.

Rather, AIGDC is simply a custodian of copies of these documents and, if Zurich's position is correct, such information in the hands of AIGDC is protected from disclosure by the joint defense privilege. AIGDC will not unilaterally waive the privilege asserted by Zurich/Crawford.

It is disingenuous for Plaintiffs to claim that AIGDC is required to disclose this information in the face of Zurich's continuing assertion of opinion work product privilege, particularly when AIGDC has plainly spelled out its position. By letter dated April 13, 2006, AIGDC informed Plaintiffs' counsel:

> The documents you seek that were generated by Zurich or Crawford, copies of which were provided to AIGDC, have been redacted [by Zurich] to withhold opinion work-product that is subject to the court's construction of the joint defense privilege. To the extent that Zurich may determine to produce some of the redacted material, AIGDC will produce its copies of those documents in the same form. Where Zurich continues to assert privilege against disclosure, AIGDC will continue to honor its right to do so. To ensure that you understand our position, AIGDC is not withholding this information upon an assertion that it qualifies as work-product of AIGDC claim personnel.[2]

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[2] A true and accurate copy of this correspondence is attached as Exhibit 1 to the Transmittal Affidavit of Brian P. McDonough ("Transmittal Affidavit") that is filed herewith.

Plaintiffs' counsel was previously made aware that AIGDC "had no dog in this fight" by a letter dated March 13, 2006, stating: "[a]s you are aware, most of the documents that have been provided in redacted form were prepared by Crawford, and our redactions are consistent with Zurich's."[3])

Although Plaintiffs may continue to argue against the protection from disclosure raised by Zurich in connection with the Crawford and McIntosh documents, its repeated attempts to obtain this information from AIGDC are improper. No legitimate grounds exist for the current motion to compel AIGDC to produce them. That AIGDC is again put to the cost of defending a patently meritless discovery motion, as it was when Plaintiffs sought to compel depositions before AIGDC had an opportunity to comply with the Court's Order of January 23, 2006, seems to reflect one of Plaintiffs' principal litigation strategies.

B. Correspondence Between Counsel for AIGDC, the Insured, and Zurich Are Protected from Disclosure.

Plaintiffs seek written communications prepared in connection with the underlying litigation between and among the insured's coverage counsel, McCarter English, and the insurers and their counsel. (Plaintiffs' memorandum, p. 14.) This Court has previously determined that Plaintiffs are not entitled to these documents.

Plaintiffs argue that the insured and the insurers "clearly were not pursuing a common interest" in the underlying action because, "it is clear from documents already produced that the withheld communications relate to a dispute between Zurich, AIGDC and their insured, GAF, over who would pay for the defense." (Plaintiffs' Memorandum, p. 14.). As an initial matter, Plaintiffs manifestly misunderstand the previously produced documents if they truly interpret them to reflect a dispute over who would pay for defense costs. Throughout the course of the

[3] A true and accurate copy of this correspondence is attached as Exhibit 2 to the Transmittal Affidavit.

underlying litigation, Zurich paid for the defense costs of counsel retained by the insured and, when AIGDC retained additional counsel to associate with the insured's counsel, AIGDC paid for those defense costs. Moreover, relying on these facts, this court has previously instructed Plaintiffs on the intended parameters of the joint defense and common interest privileges in this case:

> The joint defense privilege applies when different law firms represent clients who share common interests and choose to work as a team to further those interests. Those interests need not be identical; such a requirement would essentially deprive most clients of the benefit of joint defense agreements because the interests of different clients are rarely precisely identical. Am. Auto Ins. Co., 2000 WL 33171004 at *8 ("It is highly unlikely that any common or joint defense, at least in matters of some complexity, can proceed without some adjustment of differing interests. Indeed, joint consultations are likely to deal quite often with methods for adjusting those differing interest while maintaining a common front against the common opponent."). It is sufficient that the clients share a common interest, even while retaining interests that may be separate and distinct from each other.

Order, p. 18.)

At all relevant times the insurers, the insureds, and their respective counsel, shared a core common interest: defense and resolution of the claims asserted against the insureds in the underlying litigation in the most effective and efficient manner possible. While there may have been disagreements among respective counsel concerning, for example, their respective roles and responsibilities, and the tactical and strategic means for accomplishing their mutual goal, these differences do not nullify the protection afforded under the joint defense and common interest doctrines. While some of the documents reflecting these communications have been produced, as a result of their secondary transmission to the insured's broker, this does not entitle Plaintiffs to those written communications which were not disclosed to any party outside the joint defense group.

C. Plaintiffs Are Not Entitled to the AIGDC Excess Claims Notes That Reflect Attorney-Client Communications and Attorney Work Product, or Opinion Work Product of AIGDC Representatives That Does Not Pertain to Settlement.

Plaintiffs contend that they are entitled to receive "[w]ork product of all ... AIGDC claim representatives involved in the Rhodes claim . . . ." (Plaintiffs' motion, p. 2.) This contention ignores this Court's determination that attorney work product is not subject to disclosure (See, January 23, 2006 Order, p. 9) and the fact that attorney-client privilege has not been waived. Moreover, Plaintiffs' argument reflects its continued effort (previously reflected in their Motion for Clarification) to expand the exception to the opinion work product protection that this Court delineated in its January 23rd Order. The Court should put an end to this.

Plaintiffs present their argument in the most general terms and fail to address the specific objections raised by AIGDC. Moreover, it is only in a footnote that Plaintiffs even identify the particular claim notes at issue, and in this note Plaintiffs concede that they have not even determined which documents have been withheld. The only Excess Claim Notes that AIGDC has not produced were prepared by Martin Maturine between March and June 2004. Mr. Maturine did not "participate[] in determining the timing or the amount of the settlement offers made to the plaintiffs." (Order, p.15.) Nor do his notes reflect any assessment of the value of the case. As this Court reasoned in its January 23, 2006 Memorandum and Order, "[t]he need for disclosure of opinion work product in the insurance files becomes clear when one considers that the plaintiffs are certainly entitled to depose the claims representative responsible for determining the settlement offer and ask him to explain his reasons for making the offer." (Order, p.13.) Since Mr. Maturine was not responsible for determining the settlement offer and his notes do not contain any information relating to the timing or the amount of the settlement offers, the opinion work product of Mr. Maturine reflected in these notes, as well as the attorney-

client communications and attorney work product reflected in these notes, are protected from disclosure.

Plaintiffs' assertion that the Court's Order of January 23, 2006, required the insurers to turn over all work product prepared by any claims representatives involved in the underlying claims, blatantly disregards both the plain meaning of the terms of the Court's Order, as well as the Court's clearly articulated intent to balance the fundamental protections against disclosure with the needs of a plaintiff pursuing a claim based on an insurer's alleged failure to effectuate settlement as required by G.L. c. 176D, § (3)(9)(f). Consistent with the Court's Order, AIGDC has produced all fact work product of its claim representatives, as well as all opinion work product of those "representatives who participated in determining the timing or the amount of the settlement offers made to the plaintiffs." AIGDC has clearly explained to Plaintiffs the bases for withholding the limited number of Excess Claim Notes it has not produced. A letter to Plaintiff's counsel dated April 13, 2004, states:

> As to your arguments concerning those entries on the AIGDC Excess Claims Notes which have been redacted, they reflect attorney-client communications, opinion work product of attorneys, and/or claims personnel opinion work-product that does not concern the timing or amount of any settlement offer, or even more broadly, the assessment of claimed damages.[4]

Plaintiffs want more than this Court has required AIGDC to produce. In their crusade to obtain additional documents, they ignore the Court's deliberate balance of Plaintiffs' evidentiary needs and the fundamental protections from disclosure relied upon by AIGDC, and they disregard the Court's careful crafting of the language delineating the scope of the exception to the opinion work product protection. This Court struck a well-reasoned balance by ruling that the insurers must produce only opinion work product of personnel who participated in determining the timing or the amount of the settlement offers. As Mr. Maturine participated in

[4] Transmittal Affidavit, Exhibit 1, p. 1.

neither of these critical determinations, his withheld opinion work product is beyond the scope of Plaintiffs' discovery requests.

D. Plaintiffs Are Not Entitled to Documents Relating to National Union's Reinsurance Relationship.

Plaintiffs contend that they are entitled to documents identified on AIGDC's privilege log that reflect communications with National Union's reinsurer. Plaintiffs argue that these confidential communications are discoverable as they "could shed some light on AIGDC's motivations" in the handling of the underlying claim. Whether an insurer has insurance (called "reinsurance"), does not shed any light on whether AIGDC worked diligently to reach a settlement of the case filed by Plaintiffs against National Union's policyholder. The information that AIGDC is required to communicate to its reinsurer to establish National Union's right to receive a payment under the reinsurance policy, is even further beyond the scope of anything that is relevant or reasonably likely to lead to the discovery of admissible evidence.

Reinsurance is a contract by which an insurer cedes all or part of the risk it underwrites, pursuant to a policy or group of policies, to another insurer. *See* 13A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 7681, at 480 (1976); 19 George J. Couch, *Cyclopedia of Insurance Law* § 80:1, at 624 (2d ed. 1983). When an insurer seeks to spread the risk involved with large, single policy exposures, it uses facultative reinsurance. Another form of reinsurance, treaty reinsurance, may be used by an insurer to transfer a specified percentage of risk under all of its insurance policies to a reinsurer. *See* 19 Couch On Insurance 2d § 80:3 (1983). National Union had a reinsurance treaty under which it was entitled to recover a percentage of the amount it paid to settle Plaintiffs' case. The communications between the AIGDC and the reinsurer did not involve any analysis of the Rhodes claims or the settlement of that claim. While Plaintiffs and their counsel apparently do not understand the nature of

reinsurance, in general, or its application to the settlement amount paid to Plaintiffs, it cannot establish its right to the production of these documents by speculating that they "could shed some light on AIGDC's motivations" in the handling of the underlying claim.

II. PLAINTIFFS' MOTION FOR SANCTIONS IS FRIVOLOUS.

While plaintiffs' request for sanctions against AIGDC is wholly unfounded and any response gives the request more attention that it deserves, the irksome allegation that AIGDC has "played games" regarding its discovery obligations cannot go unanswered.

As grounds for this contention, Plaintiffs identify supplemental productions by AIGDC that have occurred in close proximity with scheduled depositions. These supplemental productions evidence no ill-motivation on AIGDC's part. To the contrary, they demonstrate that AIGDC has gone to great lengths to ensure that Plaintiffs have had all documents necessary to completing the scheduled depositions. For example, on March 27, 2006, just two days before the deposition of Nicholas Satriano, an AIGDC claim representative, Plaintiffs' counsel sent a request for production of numerous documents on AIGDC's privilege log.[5] Prior to the deposition, AIGDC produced certain documents prepared during the time Mr. Satriano was involved with the case with a letter that stated:

> While we have not completed our review and analysis of your assertion that the documents identified in your March 27, 2006, correspondence must be produced, we have completed our analysis of those documents that were generated during the time period Nicholas Satriano was involved in handling the Rhodes claim. Although we do not agree with your assertion, and we reserve the rights of AIGDC and National Union to object to their use as evidence at the trial of this matter, we have enclosed herewith those documents you have identified in your March 27, 2006, correspondence that were generated during the time Mr. Satriano was the complex claims director responsible for the Rhodes matter.[6]

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[5] Transmittal Affidavit, Exhibit 3.
[6] Transmittal Affidavit, Exhibit 4.

Plaintiffs have adopted a troubling strategy for its pretrial litigation: fight about everything. This has caused, and continues to cause, the Court and its administrative personnel to expend needless effort, and has imposed a costly and time-consuming burden on AIGDC and National Union. As AIGDC has violated no order of this Court, and at all times has diligently pursued its discovery obligations, there is no basis for Plaintiffs' request for the imposition of sanctions. Indeed, at this point, Plaintiffs' ceaseless pursuit of meritless sanctions claims should be adjudged harassment and should be explicitly discouraged.

WHEREFORE, AIGDC and National Union respectfully request that this Court deny Plaintiffs' motion to compel and for sanctions.

Respectfully submitted,

Defendants,

AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. and National Union Fire Insurance Company of Pittsburgh, PA,

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Dated: April 27, 2006

CERTIFICATE OF SERVICE

I, Brian P. McDonough, certify that on this 27th day of April, 2006, I caused a copy of the foregoing to be served by hand upon the following:

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