8/2/2005

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

MARCIA RHODES,
HAROLD RHODES, INDIVIDUALLY,
HAROLD RHODES, 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.

CIVIL ACTION NO.

05-1360BLS

DEFENDANTS,' AIG DOMESTIC CLAIMS, INC. (F/K/A AIG TECHNICAL SERVICES, INC.) AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION

I. INTRODUCTION

Defendants, AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. ("AIGDC") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union")("collectively "AIG"), file this Memorandum in Opposition to Plaintiffs' Motion to Compel the Production of Documents. In their Complaint, the plaintiffs allege that National Union and AIGDC violated Mass. G. L. c. 93A and c. 176D in their handling of the underlying tort action against National Union's insureds. The plaintiffs served document requests in this case that requested the

production of privileged materials. In response, National Union and AIGDC produced the discoverable portion of AIGDC's claims file and a detailed privilege log. AIG opposes plaintiffs' motion to compel on the grounds that the materials at issue are clearly protected by: (a) the attorney-client privilege; (b) the work product doctrine; and (c) the joint defense and common interest doctrines. Moreover, as explained below, some of the materials requested by the plaintiffs otherwise exceed the bounds of permissible discovery.

Notwithstanding Plaintiffs' inflammatory rhetoric, the plaintiffs not only expected the defendants to raise these privileges, but they expressly acknowledged that the applicability of these privileges would be the subject of motion practice. In their civil action cover sheet, plaintiffs said they "anticipate that this case will require close management for discovery purposes because it will likely require the resolution of defendants' claims that crucial documents are protected from disclosure in discovery by the attorney-client privilege and as attorney work product." After themselves recognizing that defendants would assert these privileges, it is disingenuous for the plaintiffs to now assert that AIG has exhibited "utter disregard" for the Rules of Civil Procedure by asserting such privileges.

AIG has asserted well-founded, legitimate objections to plaintiffs' document requests. As an initial matter, AIG notes that:

- AIG's initial privilege log adequately provided sufficient detail to determine the applicability of the privileges. The onerous detail demanded by the plaintiffs regarding the privileged documents is unreasonable, unduly burdensome and unsupported by Massachusetts law. Nonetheless, AIG has revised its privilege log (see Exhibit A) to provide even more detail and has also provided the court with the attached affidavits of Peter E. Mueller, Esq. and Robert J. Maselek, Jr., Esq., in further support its claims of privilege;

- The number of privileged documents is not relevant to determining whether the documents are privileged - privilege attaches whether a party seeks advice from an attorney once or one thousand times over the course of a case;

- The mere fact that the plaintiffs have alleged G. L. c. 93A and c. 176D claims does not automatically entitle them to obtain copies of otherwise privileged materials;

- AIG has not raised advice of counsel as a defense to the plaintiffs' allegations and has not otherwise waived any of the applicable privileges;

- Documents protected from disclosure by the attorney client privilege and the joint defense/common interest and work product doctrines, during the course of the underlying litigation, do not lose that protection in this Mass. G. L. c. 93A claim simply because the underlying case is now resolved;

- The "substantial need" test is inapplicable to documents protected by the attorney-client privilege (and the joint defense/common interest doctrines to the extent that the objection is based on communications between attorneys) and to opinion work product; and

- The plaintiffs have failed to satisfy the "substantial need" test for obtaining discovery of documents protected from disclosure by the work product doctrine.

AIG has claimed privilege with respect to eleven categories of documents: (a) correspondence between AIGDC and its counsel in this Chapter 93A matter, McCormack & Epstein; (b) correspondence between AIGDC and Campbell, Campbell, Edwards & Conroy ("Campbell"), defense counsel retained by AIGDC to represent its insured, Building Materials Corporation of America d/b/a GAF Materials Corporation ("GAF") in the underlying matter; (c) Campbell's internal correspondence; (d) correspondence between AIGDC and its coverage counsel, Harwood Lloyd; (e) communications related to the defense of the underlying matter between and/or among GAF; its coverage counsel, McCarter & English; its defense counsel in the underlying matter, Campbell, Sloan & Walsh and Nixon Peabody; AIGDC (which adjusted the underlying claim for GAF's excess carrier, National Union); and Zurich (GAF's primary carrier); (f) communications related to the defense of the underlying matter between and/or among GAF, McCarter & English, Campbell, Sloan & Walsh, Nixon Peabody, AIGDC, Zurich North America, and Crawford & Company (which adjusted the claim on behalf of Zurich); (g)

AIGDC internal documents related to the underlying matter after litigation was commenced; (h) AIGDC internal documents related to the underlying matter before litigation was commenced but after plaintiffs' counsel sent a letter of representation; (i) correspondence among the defendants and their counsel in the underlying matter; (j) communications involving GAF's insurance broker, Willis Corroon; and (k) miscellaneous documents.

II. FACTUAL BACKGROUND

This action arises out of a claim for personal injuries suffered by the plaintiff, Marcia Rhodes, and loss of consortium claims brought by her husband and their daughter. In January 2002, Marcia Rhodes was injured when her vehicle was struck from behind by a truck driven by Carlo Zalewski, an employee of Driver Logistics ("DLS"). The truck was owned by Penske Truck Leasing Corporation and was leased to GAF. As a result of the accident, Marcia Rhodes is paralyzed from the waist down.

In July 2002, plaintiffs brought suit against GAF, Penske, DLS, and Zalewski. Zurich issued a $2 million primary policy to GAF. National Union provided excess insurance above Zurich's $2 million primary layer. It was eventually determined that the other defendants were also insureds under the Zurich and National Union policies. DLS and Zalewski filed a third-party complaint against Jerry McMillan Professional Tree Services and The Town of Medway. Prior to trial, McMillan settled for $550,000 and the Town was dismissed. While the fault of Zalewski may have been clear early on, the extent of the "liability" of AIG's insureds, which for purposes of Chapter 93A means both fault and damages, was hotly contested through the trial.

In August 2003, plaintiffs made a $16.5 million settlement demand. In December 2003, the plaintiffs raised their demand to $18.5 million. The plaintiffs subsequently raised their settlement demand to $19.5 million. Zurich, the primary carrier, did not offer the plaintiffs its $2

million policy limits until March 2004. Thereafter, AIG sought to mediate the matter. The plaintiffs did not counter the $2 million offer and steadfastly refused to engage in meaningful settlement negotiations. At a mediation held on August 11, 2003, the plaintiffs' final settlement demand was $15 million (plus assumption of Marcia Rhodes' health insurance). The final settlement offer at the mediation was $3.5 million.[1]

Prior to trial, the defendants (other than Penske[2]) stipulated to liability. During the September 2004 trial, AIG offered plaintiffs $6 million. The jury awarded Marcia Rhodes $7.412 million; Harold Rhodes $1.5 million; and Rebecca Rhodes $500,000. Following trial, the plaintiffs' counsel was quoted in Massachusetts Lawyers Weekly as stating: "Our biggest fear was the jury coming in with a $2 million verdict they thought was a lot of money, but would be insufficient to take care of that family." (See Exhibit B).[3]

The defendants (GAF, DLS and Zalewski) filed a notice of appeal. They contended that the verdict was excessive and that the trial judge committed reversible error by: (1) precluding the defendants from obtaining copies of Marcia Rhodes' mental health records - especially given her testimony at trial that the incident exacerbated pre-existing mental health conditions (depression and bi-polar issues); and (2) by not dismissing a juror. The underlying matter recently settled for an amount that was less than the judgment (including interest).

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[1] In addition to the $550,000 the plaintiffs received from McMillan.

[2] The claim against Penske was dismissed during the trial.

[3] Plaintiffs' counsel's admission that their "biggest fear" was that the jury would render a "$2 million verdict" is powerful evidence as to the reasonableness of the defendants' settlement negotiations in the underlying matter. Having admitted that it was certainly possible that the jury might award $2 million in the underlying matter - indeed, that such a verdict was plaintiffs' counsel's "biggest fear" - how can the plaintiffs now argue with a straight face that defendants' settlement offers of $2-$6 million were unreasonable? Plaintiffs' counsel's published statement as to the potential jury verdict is admissible in this action. See Blake v. Hendrickson, 40 Mass. App. Ct. 579, 581-82 (Mass. Ct. App. 1996) (letters signed by a party's attorney may qualify as an admission of a party opponent or a prior inconsistent statement); H. Alperin & L. Shubow, Massachusetts Practice Series, Summary Of Basic Law, §13.125 ("out-of-court statements of an attorney may be admissible against the client as an evidentiary admission made by an agent . . . .").

In April 2005, the plaintiffs filed this lawsuit alleging that defendants violated G. L. c. 93A and c. 176D by not making reasonable offers of settlement after liability had become reasonably clear. National Union and AIGDC deny the plaintiffs' allegations and contend they acted in good faith at all times and the settlement offers they made were reasonable under the circumstances (especially considering plaintiffs' exorbitant settlement demands).

The defendants ask the court to take judicial notice of the docket in the underlying matter (See Exhibit C). The docket reflects that the following attorneys represented GAF: (1) Grace Wu, Gregory Deschenes and Melissa Tierney of Nixon Peabody; (2) Russel Pollock and William Conroy of Campbell; and (3) Myles McDonough of Sloan & Walsh. In addition, Lawrence Boyle and John Knight of Morrison Mahoney and Steven Leary represented DLS and Zalewski. Finally, John Johnson and Timothy Corrigan of Corrigan, Johnson & Tutor represented Penske.

III. ARGUMENT

A. Correspondence Between McCormack & Epstein and AIG is Protected By the Attorney-Client Privilege

The unreasonably broad scope of plaintiffs' Motion to Compel is reflected by their attempt to compel production of correspondence between the undersigned counsel, McCormack & Epstein, and its clients, AIG (Category A on the attached Privilege Log).

The attorney-client privilege applies to confidential communications between an attorney and a client. In asserting the attorney-client privilege regarding this – and other categories of privileged documents (discussed below) -- the defendants are exercising their right to maintain the confidentiality of communications protected by the oldest and most sacrosanct privilege applicable to the legal profession. The United States Supreme Court has explained that:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public

> interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (internal citation omitted).

The attorney-client privilege applies if the person asserting the privilege was a client or prospective client of the attorney, and (1) the communications were received from a client during the course of the client's search for legal advice from the attorney; (2) the communications were made in confidence; and (3) the privilege has not been waived. In the Matter of the Reorganization of Elec. Mut. Liab. Ins. Co., Ltd. (Bermuda), 425 Mass. 419, 421 (Mass. 1997).

As reflected in the Affidavit of Robert Maselek (See Exhibit D): (a) the only communications concerning this matter between AIG and McCormack & Epstein occurred *after* the plaintiffs filed their Complaint in this matter; (b) all such communications relate to McCormack & Epstein's defense of this matter and include the thoughts and opinions of counsel; and (c) none of this correspondence has been disclosed to third parties. Thus, all such documents – contained in Category A of the defendants' Privilege Log – are protected from disclosure.[4]

B. Correspondence Between Campbell and AIGDC is Protected By the Attorney-Client Privilege

Category B on the attached Privilege Log relates to confidential correspondence between AIGDC and Campbell. All of these documents were created after litigation was commenced in the underlying matter. In Massachusetts, it has long been the rule that defense counsel appointed by an insurer to represent an insured defendant represents both the insured and the insurer. See

[4] AIG has not specifically enumerated each individual document, because all such correspondence is of the same character and is clearly privileged. In addition, such a process would be harassing and unduly burdensome given the large number of such documents that exist.

Imperiali v. Pica, 338 Mass. 494, 499 (1959) ("[A]n attorney undertaking the defense of the case covered by the policy is an attorney for both the insurer and the insured and owes to each a duty of good faith and due diligence in the discharge of his duties."); McCourt Co., Inc. v. FPC Properties, Inc., 386 Mass. 145, 146 (1982); MBA Ethics Opinion No. 77-16 (attached hereto within Exhibit H) ("When an attorney is retained by a casualty insurance company to represent an insured, the attorney is in fact representing not only the insurance company's interest in defeating the plaintiff's litigation, but also is representing the insured[.]"); Guevara v. Medical Professional Mut. Ins. Co., 2003 WL 23718323, *1 (Mass. App. Ct. 2003) (Mason, J) (attached hereto within Exhibit H) ("[T]he judge properly took into account that the attorneys appointed by the company to represent [the insured] . . . also had an attorney-client relationship with the company[.]").

Since an attorney-client relationship exists between Campbell and AIGDC, communications between AIGDC and Campbell relating to Campbell's defense of GAF against the Rhodes matter are absolutely privileged. See Ethical Lawyering in Massachusetts, MCLE, R. Neumeier, Ed., Vol. 1, § 13.2, *3 (2002) (attached hereto within Exhibit H) (collecting cases) ("It is ***universally accepted*** that communications between defense counsel and the insurer may be protected from discovery because of the attorney-client privilege.") (emphasis added). As indicated in the Privilege Log, the documents withheld from production clearly relate to defense-related activities. Thus, the communications between Campbell and AIGDC – referenced in Category B of the defendants' Privilege Log – are protected from disclosure.

C. Internal Correspondence Among Campbell Attorneys is Protected By the Work-Product Doctrine

Rule 26(b)(3) exempts from discovery materials, "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including his

attorney . . ." The "test is whether or not '[a]t the time the item was prepared, was the person preparing it acting on behalf of the person who later became a party to the present action?'" Dyson v. Janson, 2004 WL 3091644, *1 (Mass. Super. 2004) (attached hereto within Exhibit H) (quoting J. Smith & H. Zobel, Massachusetts Practice Series, Rules Practice §26.5 at 210 (1975)).

The documents contained in Category C of the Privilege Log include internal correspondence among Campbell attorneys. All of these documents were created *after* litigation was commenced in the underlying matter. Moreover, it is evident from the Privilege Log that the subject matter of these communications concerned Campbell's defense of the insureds and constitute "opinion work product" (for example, "overview of Plaintiffs' claims against GAF as Zalewski's "statutory employer," "overview of liability and damages"). These materials are clearly protected from disclosure.

The work product doctrine continues to protect documents during Chapter 93A litigation - even when the underlying case has been concluded. In Guevara, 2003 WL 23718323 *1 (October 24, 2003) (attached hereto within Exhibit H), the single justice declared:

> [I]n light of the purpose of the work product doctrine to allow attorneys to prepare their cases without fear that their efforts in doing so ultimately will be used against their clients, the judge should have applied the doctrine to the documents prepared prior to [the conclusion of the underlying action] . . . unless the plaintiffs showed that they had a "substantial need" for the documents, and could not obtain the "substantial equivalent" of the documents without "undue hardship. There is no "blanket exception" to the work product doctrine in cases such as the present one. Rather, discovery of documents protected by the doctrine still must be based on a particularized showing warranting such discovery.

Likewise, in A.W. Chesterton Co. v. Allstate Ins. Co., 2001 WL 170460 *1 (Mass. Super. 2001) (attached hereto within Exhibit H) (internal citations omitted), Judge McHugh stated that:

> [T]the work-product privilege applies to documents created in anticipation of litigation other than the litigation in which the documents are sought. To be sure, several courts have concluded that the privilege applies only to the litigation in which the motion to compel was filed. That, however, is the minority view. The majority view is to the contrary. The majority rule is the better rule. Given the strong support decided Massachusetts cases have given to the relationship between client and attorney, . . . that is the rule I am persuaded Massachusetts appellate courts will adopt when and if the issue is squarely presented to them. The work-product privilege rests on the proposition that an attorney should be able to prepare his or her case without fearing that the effort he or she expands in doing so ultimately will be used against his or her client. In this context, as in others, protection of the client is paramount. . . . Limiting the work-product privilege to the case in which the documents are prepared thus would severely undermine one of the privilege's principal goals.

The plaintiffs have asserted in a cursory and generalized manner that they have a "substantial need for the information, which is not available from any source," but they have not provided any specific examples of what information they are referring to or why such information is not available from another source (for example, deposition testimony). Therefore, they have not met their burden of proving that the exception to the work product rule applies. See Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co., 173 F.R.D. 7, 12 (D. Mass. 1997) ("More recent case law rejects 'a blanket waiver of privilege and work product protection in a bad faith insurance case.' Thus, 'A simple assertion that an insured cannot otherwise prove her case of bad faith does not automatically permit an insured to rummage through the insurers' claims file.'")(internal citations omitted); Hartford Financial Serv. Group, Inc. v. Lake County Park & Rec. Bd., 717 N.E.2d 1232, 1237 (Ind. Ct. App. 1999) ("[T]o establish a claim for bad faith, the facts, rather than the legal advice or opinions pertaining to the insurer's decisions, can be developed through depositions and other discovery of non-privileged information. A simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurer's claims file."); J. Smith and H. Zobel, supra

at §26.5 ("'Substantial need"' means considerably more than pleasant desirability; it requires showing that the item plays an exceptionally important part in the preparation of the discoverer's case for trial. . . . [T]o meet the standard, one must convince the court that the materials sought encompass, in a wholly unique, unduplicatable manner, the information sought[.]")

Moreover, the plaintiffs ignore the distinction between "opinion work product " and "ordinary work product." Rule 26(b)(3) provides that documents prepared in anticipation of litigation are discoverable only upon a showing of "substantial need" by the party seeking discovery. Even if the plaintiffs satisfy the "substantial need" test, however, Rule 26(b)(3) instructs that the court, "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning litigation."

In Dyson, 2004 WL 3091644 at *2, Judge Houston explained that, "[t]here is a distinction under Rule 26(b)(3) between documents prepared in anticipation of litigation that contain thoughts and impressions and those that only contain facts. The former category is never discoverable while the latter is discoverable upon the requisite showing of substantial need and undue hardship."

In McMillan v. Westport Ins. Corp., 2004 WL 3220112, *2 (Mass. Super. 2004), Judge Botsford indicated that, "[i]n analyzing whether a person seeking work product presents 'adequate reasons' the court distinguishes between 'opinion work product' and 'ordinary work product.' Opinion work product includes materials that contain the mental impressions, conclusions or legal theories of an attorney and ordinary work product covers the residual. Some courts grant absolute immunity to opinion work product, but only qualified immunity to ordinary work product where a party may overcome the privilege by showing a substantial need." Id. (internal citation omitted).

The documents enumerated in Category C of defendants' Privilege Log involve opinion work product, which is absolutely protected. Even if this was not the case, plaintiffs have failed to establish a "substantial need" for the documents. Thus, the plaintiffs' motion to compel production of the internal communications among Campbell attorneys should be denied.

D. Correspondence Between Harwood Lloyd and AIGDC is Protected By the Attorney-Client Privilege

All communications between AIG and its coverage counsel, Harwood Lloyd – enumerated in Category D of the defendants' Privilege Log – are protected from disclosure by the attorney-client privilege. As explained in the Affidavit of Peter Mueller (See Exhibit E) AIGDC retained Mueller to provide legal advice regarding insurance coverage-related issues arising out of the Rhodes matter.

AIG is not claiming that it is relying in this matter upon the advice provided by Attorney Mueller nor has it otherwise waived the attorney-client privilege with respect to these documents. Thus, these communications are protected from disclosure by the attorney-client privilege.

E. Communications Involving GAF, AIGDC, Zurich and GAF's Counsel Are Protected By the Attorney-Client Privilege and Work-Product Doctrine

Category E involves communications between and among AIG's insured (GAF), GAF's attorneys and GAF's primary and excess insurers (AIG and Zurich).[5] These documents are

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[5] It is well established that a primary carrier has an obligation, inter alia, to keep an excess carrier informed of significant factual and legal developments during the pendency of a claim. See American Centennial Ins. Co. v. Warner-Lambert Co., 681 A.2d 1241, 1246 (N.J. Super. 1995) (recognizing "unique relationship" between a primary and excess carrier. "The unique relationship results because the excess insurer relies upon the primary carrier to act in good faith in processing claims. This includes reliance upon a primary carrier to act reasonably in: (1) discharging its claims handling obligations; (2) discharging its defense obligations; (3) properly disclosing and apprising the excess carrier of events which are likely to effect that carrier's coverage; and (4) safeguarding the rights and interests of the excess carrier by not placing the primary carrier's own interests above that of the excess insurer. The actions of the primary carrier can affect the rights of the excess carrier. This duty then is protected by industry custom and the common law."); U.S. Fire Ins. Co. v. Morrison Assur. Co., 600 So.2d 1147 (Fla. Ct. App. 1992).

protected by the work product doctrine and the attorney-client privilege. Although a large number of individuals were involved in some of these communications, they all essentially involve a single party (GAF) discussing litigation with its attorneys and carriers. These documents reflect communications between and among the "core group" involved in the defense of the Rhodes matter from GAF's perspective. Clearly, there exists an attorney-client relationship between GAF and its defense and coverage counsel. Moreover, as explained above, an attorney-client relationship exists between defense counsel and the carriers. As reflected in the Privilege Log, the substance of these communications clearly relates to the defense of the underlying matter. The members of this "core group," all of whom were in privity with each other and had an essentially identical interest in defending against the underlying claim, were entitled to strategize about the defense of the plaintiffs' claims in the underlying matter without fear that such discussions may have to later be disclosed to the plaintiffs. In any event, plaintiffs' motion to compel ignores the fact that GAF also holds a privilege with respect to some of these documents and there is no evidence that GAF has waived the privilege.

To the extent that the correspondence enumerated under this category involves communications between GAF's counsel in the underlying action, such communications are protected by the work-product doctrine. The plaintiffs have failed to proffer any substantive arguments regarding why they should be entitled to obtain copies of such correspondence.

Even if the court is unpersuaded that the attorney-client privilege or work product doctrine shields the production of these documents, the joint defense and common interest doctrines clearly attach to these documents.[6] As explained in a leading treatise:

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[6] The "common interest" and "joint defense" doctrines are essentially the same thing and these terms have been used interchangeably. See Ken's Foods, 213 F.R.D. at 93 n. 7 (D. Mass. 2002) ("common interest," "joint defense," "joint client" and "allied lawyer" doctrines have the same basis); American Automobile Ins. Co. v. J.P. Noonan Transp.,

> Although there is no published Massachusetts appellate decision on the subject, numerous federal courts and at least one Single Justice opinion have recognized an extension of the attorney-client privilege to communications among different persons and counsel made for the purpose of advancing a common interest in litigation. This "joint litigation privilege" protects communications between a person and an attorney for another person where the communication is part of an ongoing effort to set up a common litigation strategy.

49 Mass. Practice Series, Discovery, § 2.6.

In order for the joint defense or common interest exception to apply, "the party asserting the privilege must show that: (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived." Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 93 (D. Mass. 2002) (quoting United States v. Bay State Ambulance and Hosp. Rental Serv. Inc., 874 F.2d 20, 28 (1st Cir.1989)).

In American Automobile Ins. Co. v. J.P. Noonan Transp., 2000 WL 33171004 (Mass. Super. 2000) (attached hereto within Exhibit H), the court applied the joint litigation privilege to communications between several different insurers and counsel who had been employed to defend an environmental pollution claim. Id. at *1-2. The court concluded:

> At a time and in an age where transactions and the litigation they produce are increasingly complex, I am of the opinion that the joint defense or common interest components of the attorney-client privilege are necessary to ensure, as a practical matter, that clients receive the fully informed advice the attorney-client privilege is designed to produce. Individuals or entities with joint or common interests simply cannot obtain such advice if their attorneys must proceed in splendid isolation and are prohibited from interacting with others for the purpose of determining whether and to what extent common measures for preservation of common interests are available, feasible and agreeable to all who may have such interests. I am of the opinion, in sum, that the privilege is fully consistent with the

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2000 WL 33171004, **5-6 (Mass. Super. 2000) (attached hereto within Exhibit H) (using "joint defense" and "common interest rule" interchangeably and noting, "[a]lthough the two may have slightly different characteristics, nomenclature is less important than establishing functional boundaries."); Dedham-Westwood Water District v. National Union Fire Ins. Co., 2000 WL 33593142 (Mass. Super. 2000)(Connolly, J.) (applicability of the privilege, "is the same under each of these denominations.").

> principles upon which the attorney-client privilege rests in Massachusetts and, in fact, is part of Massachusetts common law.

Id. at *7. Moreover, as noted by Judge McHugh:

> 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 interests while maintaining a common front against the common opponent. If a joint defense or common interest privilege is to have any practical effect, therefore, it must survive exchanges in which the parties discuss and adjust those differing interests.

Id. at *8.

During the pendency of the underlying matter, the parties on the "defense side" of the Rhodes matter obviously all had a "common interest" in defending against the Rhodes matter. In addition, the unity of interest between the primary insurer, Zurich, and the excess carrier, National Union, required that confidential and sensitive information be shared among them. The participation of coverage counsel on behalf of the insurers and the insured does not obviate the privilege, since "joint consultations are likely to deal quite often with methods for adjusting those differing interests while maintaining a common front against the common opponent." American Automobile, 2000 WL 33171004 at *8. Moreover, this privilege does not require a formalized written agreement. See Ken's Foods, 213 F.R.D. at 93 (noting that "a written agreement is not a prerequisite for invoking the common interest doctrine"). The discussions among the persons reflected in the Privilege Log (those parties with a "common interest" in defending against the Rhodes litigation) are clearly within the parameters of the "joint defense" privilege.

Thus, the communications between and among GAF, its attorneys and insurers– referenced in Category E of the defendants' Privilege Log – are protected by the attorney-client privilege and work product, joint defense and common interest doctrines.

F. Communications Involving Crawford & Company Are Protected By the Attorney-Client Privilege and Work-Product Doctrine

Category F contains communications between and among GAF, its attorneys and insurers and claims representatives from Crawford & Company. This category of documents contains the same type of communications involved in Category E (discussed immediately above), with the additional involvement of claims representatives from Crawford & Company. As reflected in Exhibit F, Zurich retained Crawford to engage in claims and adjusting services, specifically including claims against GAF. For the purpose of the relevant discovery issues, Zurich and Crawford are essentially the same entity. Communications to or from Crawford enjoy the same discovery protections as communications to or from Zurich would enjoy. Thus, for the reasons discussed above, these communications are privileged and the plaintiffs' motion to compel such documents should be denied.

G. AIGDC Internal Correspondence Created After Litigation Was Commenced in the Underlying Matter is Protected By the Work-Product Doctrine and Attorney-Client Privilege

The documents contained in Category G of the Privilege Log include AIGDC internal correspondence created after litigation was commenced by the plaintiffs in the underlying matter. Rule 26(b)(3) exempts from discovery, materials, "prepared in anticipation of litigation or for trial by or for another party . . . ." The essential question is what was the primary motivating purpose behind the creation of the documents enumerated in Category G. It is obvious from the Privilege Log that these documents were: (a) created after litigation had actually commenced; (b) related to the defense of the litigation; and (c) were prepared because of the litigation. The policy behind the work product doctrine would be frustrated if an insurer could not freely document information obtained concerning pending litigation, and to summarize

the status of the litigation and the defense strategy, without the fear that this documentation may be later used against it.

In addition, contrary to the plaintiffs' assertion that these documents have been redacted "for no reason," as noted in the Privilege Log, many of the diary notes contain memorializations and notes of conversations with defense counsel and are thus protected from disclosure by the attorney-client privilege. As explained above, an attorney-client relationship existed between AIGDC and Campbell. To the extent that the claim notes reflect notes of conversations with defense counsel, these notes are protected by the attorney-client privilege.

Finally, plaintiffs have failed to establish that they have a "substantial need" to obtain this information or that such information is unavailable elsewhere (for instance, by deposition). In fact, plaintiffs have yet to depose any AIGDC representatives, or anyone else for that matter.

Thus, the documents contained in Category G of the defendants' Privilege Log are protected by the attorney-client privilege and work product doctrine.

H. AIGDC Internal Correspondence Created Before The Underlying Complaint Was Filed is Also Protected By the Work-Product Doctrine

The documents enumerated in Category H consist of internal documents prepared by AIGDC concerning the Rhodes matter before the plaintiffs filed the underlying complaint. Category H contains five claim diary notes; written in February, March and April 2002. As reflected in Exhibit G, plaintiffs' counsel sent a letter of representation to GAF on January 23, 2002, before any of these notes was created. The mere fact that these notes were created before the underlying complaint was filed does not automatically make these notes discoverable - these notes clearly were prepared in anticipation of the threatened litigation. Furthermore, the plaintiffs have failed to establish that they have a "substantial need" to obtain this information - or that such information is unavailable elsewhere.

Thus, the documents contained in Category H of the defendants' Privilege Log are also non discoverable.

I. Correspondence Among Parties and/or Counsel in the Underlying Matter Is Privileged

The documents enumerated in Category I consist of 14 pieces of correspondence among the defendants and counsel in the underlying case (this group is broader than the participants in the correspondence detailed in Categories E and F). Most of these documents are status reports sent by defense counsel to Crawford. Significantly, all of the defendants in the underlying matter qualified as insureds under both the Zurich and National Union policies. Thus, although the defendants retained separate counsel, all of the attorneys were reporting to Zurich (through Crawford). Zurich was sharing information with the excess carrier, AIG.

This correspondence is protected by the joint defense/common interest and work product doctrines. Nearly all of these communications occurred after the underlying complaint was filed. Moreover, it is evident from the Privilege Log that these communications concerned the defense of the Rhodes litigation (for example, status reports related to defense strategy and damages and liability analysis). The participants in this correspondence had a "common interest" in defending the Rhodes claim and an attorney-client relationship existed between Zurich (through Crawford) and all of the defense attorneys. That these reports were shared by Crawford with GAF and AIGDC does not destroy the privilege, because GAF and AIGDC were "aligned" with counsel insofar as there existed a common interest in coordinating defense strategy and sharing defense-related information. These communications were made in the course of a joint litigation effort; were designed to further that effort; and the privilege has not been waived by any of the participants in that effort.

Thus, the documents contained in Category I of the defendants' Privilege Log are protected from disclosure by the work product doctrine and attorney-client privilege.

J. Communications Involving the Insured's Broker, Willis Corroon, Are Privileged

The documents enumerated in Catagory J consist of ten communications among the defendants and defense counsel in the underlying case that were contemporaneously copied to GAF's insurance broker, Willis Corroon. These documents are protected by the joint defense/common interest and work product doctrines. The distribution of this correspondence to Willis does not destroy the privilege, because Willis shared a common interest with the parties in facilitating the resolution of any insurance coverage issues and in insuring that the defense of the Rhodes matter was proceeding smoothly.

In Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. 463, 470-72 (W.D. Tenn. 1999), the court recognized that the joint defense privilege applied to communications shared between an insured, its insurance broker and counsel. Royal Surplus involved a coverage dispute between an insured and its insurer. Id. at 466. The insured's broker - who was not a party to the declaratory judgment action - withheld from production applications for insurance to other carriers, claiming attorney-client privilege, joint defense privilege and work product doctrine protected these documents from discovery. Id. The carrier argued that any protection that may have attached to these documents had been waived by the insured because a broker had been present during the communications and had received some of the work product. Id. at 468. In Royal Surplus, as in this case, the communications at issue involved a number of parties (in Royal Surplus, employees of the insured, the insured's in-house counsel, the insured's outside litigation counsel, the broker, and the broker's in-house counsel were all involved in the disputed correspondence). Id. at 469.

The court held that, [g]iven the level of complexity involved in the transaction, and the extent to which [the broker] . . . was involved in the negotiations on behalf of [the insured] . . ., [the broker] should be deemed an 'insider' with respect to communications he shared in both before and after the issuance of the policy." Id. at 471. Thus, the broker's presence did not obviate the privileged nature of the communications. See also, Miller v. Haulmark Transp. Systems, 104 F.R.D. 442, 445 (E.D. Pa.1984) (presence of an insurance agent at a meeting of the insured and its attorney did not void the attorney-client privilege); Allianz v. Rusty Jones, Inc., 1986 WL 6950 (N.D. Ill. June 12, 1986) (attorney-client privilege applicable to letter from the insured to the insured's counsel even though the insured's insurance broker was copied); Exxon Corp. v. St. Paul Fire & Marine Ins., 903 F.Supp. 1007, 1010 (E.D. La.1995) (communications between insurance broker, insured, carrier, and law firm representing the carrier and the insured remained privileged. notwithstanding the involvement of the broker)).

Thus, the documents contained in Category J of the defendants' Privilege Log are protected by the work product and joint defense doctrines and attorney-client privilege.

K. The Remaining Documents Are Privileged

The remaining documents detailed in the defendants' Privilege Log - contained in Category K - consist of three pieces of correspondence. The first, AIG's confidential Mediation Memorandum, is apparently not part of the Motion to Compel. In any event, it is protected by the Mediation Privilege. See G.L. c. 233, § 23C . The other two documents are protected from disclosure by the work product doctrine (a letter to Morrison, Mahoney & Miller concerning jury verdict research in the underlying matter and a letter to AIG from a structured settlement company concerning claim resolution services).

L. Reserve Information is Not Discoverable

The defendants have withheld from production or redacted information concerning the reserves it set for the Rhodes matter (see Privilege Log Doc. Nos. 18, 41, 43, 53, 55, 259). Reserve information is not relevant to any of the issues in this matter, is protected by attorney-client privilege and work product doctrine, and potentially would be prejudicial if disclosed.

Reserving practice is a financial and actuarial product of governmental insurance industry regulation that is intended to protect the financial security of policyholders, the public, and insurance carriers. Statutes generally require insurers to maintain an adequate pool of funds to satisfy potential liabilities under issued policies. As explained in Silva v. Basin Western, Inc., 47 P.3d 1184, 1189 (Colo. 2002)(internal citations omitted):

> Reserve amounts are only partially within the insurer's control. Modern statutes, . . . require insurers to maintain reserves to assure the insurer's ability to satisfy its potential obligations under its policies. The insurer must reasonably estimate the amount necessary to provide for the payment of all losses and claims for which the insurer may be liable. The reserves must also reflect all potential claim expenses and any claim the insurer undertakes to defend since the insurer will have claim handling expenses, including attorney fees and court costs. The reserve requirement therefore reflects a desire on the part of the states and the insurance companies themselves to ensure that resources are available to cover the insurer's future liabilities. Thus, a particular reserve amount does not necessarily reflect the insurer's valuation of a particular claim.The Motion to Compel should be denied, because: (1) reserve information is neither relevant nor likely to lead to the discovery of admissible evidence and is confidential, commercial or otherwise proprietary in nature; and (2) these documents are protected from disclosure by the attorney-client privilege and work product doctrine.

Many courts have refused demands for discovery into individual case reserves, on the grounds that reserve information is not relevant and is protected by the attorney-client privilege or work product doctrine. See Peco Energy Co. v. Ins. Co. of North America,852 A.2d 1230, 1234-35 (Pa Super. Ct. 2004) (reserve information, "has a tenuous relevance and constitutes work product material . . . [and] any reserve figure calculated with the help of counsel reveals

the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. Insurance reserves, by their very nature, are prepared in anticipation of litigation, and consequently, [are] protected from discovery as opinion work product.") (internal citations and punctuation omitted); American Protection Ins. Co. v. Helm Concentrates, Inc., 140 F.R.D. 448, 450 (E.D. Cal. 1991) (reserve information not discoverable even when insured has alleged bad faith claim); Taxel v. Equity Gen. Ins. Co., 80 B.R. 512, 517 (S.D. Cal. 1987) (discovery of reserve information denied because "a reserve cannot accurately or fairly be equated with an admission of liability or the value of any particular claim."); Youell v. Grimes, 202 F.R.D. 643, 652 (D. Kan. 2001) (noting numerous courts have held that reserve information is not relevant); J.C. Assoc. v. Fidelity & Guaranty Ins. Co., 2003 WL 1889015 (D. D.C. April 15, 2003); Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co., 117 F.R.D. 283, 288 (D. D.C. 1986); Hoechst Celanese Corp. v. National Union Fire Ins. Co., 623 A.2d 1099, 1109 (Del. Super. Ct. 1991).

In Silva, the court explained that, "[n]either reserves nor settlement authority reflect an admission by the insurance company that a claim is worth a particular amount of money. . . . As a general rule, reserves and settlement authority are not reasonably calculated to lead to discoverable evidence and are therefore not subject to discovery." 47 P.3d at 1191. Therefore, plaintiffs' motion to compel production of reserve information should be denied.

M. Claims Manuals are Not Discoverable

The Motion to Compel the Production of claims manuals related to personal injury and/or motor vehicle claims should be denied, because claims and underwriting manuals are neither relevant nor likely to lead to the discovery of admissible evidence and are confidential, commercial or otherwise proprietary in nature. The plaintiffs have failed to explain how or why

claims manuals are relevant to this matter. In addition, plaintiffs have not cited any Massachusetts authority in support of their argument that AIG should be compelled to produce any responsive manuals. Such materials are not be relevant to any issues involved in this case.

Massachusetts law - not AIG's internal guidelines - dictate the legal ramifications of AIG's conduct. In Hadenfeldt v. State Farm Mut. Auto. Ins. Co., 239 N.W.2d 499 (Neb. 1976), the court expressly held that internal practices do not establish contractual duties. The court explained that, in performing their contractual obligations, insurance companies are only "required to use the diligence, skill, and care ordinarily employed by persons in the insurance industry. There [is] no issue that [can] be determined upon the basis of company standards or rules prescribed by the [insurance company]." Id. at 504.

In Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391 (E.D. Pa. 1996), an insurer denied the insured's property damage claim. The insured asserted causes of action for, inter alia, breach of contract, bad faith, and deceit against the carrier. During discovery, the insured requested all insurance manuals relating to in-house underwriting and claims adjustment procedures. The court concluded that the claims and underwriting manuals were not discoverable because, "the contents of these manuals do not pertain to whether the plaintiff's present claim for loss is 'covered' under the insurance contract issued by the defendant. Moreover, ***the fact that the defendant may have strayed from its internal procedures does not establish bad faith on the part of the defendant in handling the plaintiff's loss.***" Id. at 396 (*emphasis added*); see also Atlantic Mut. Ins. Co. v. American Academy of Orthopaedic Surgeons, 734 N.E.2d 50, 62-63 (Ill. Ct. App. 2000) (upholding trial court's decision to deny insured's motion to compel insurer to produce claims manual); State Farm Florida Ins. Co. v. Gallmon, 835 So.2d 389, 389 (Fla. Ct. App. 2003) (insurer was not required to produce, inter

alia, its company policies and manuals and training materials because such materials were either irrelevant or were protected work product).

Thus, plaintiffs Motion to Compel claims manuals should be DENIED. If the Court is nonetheless inclined to require AIG to produce underwriting manuals, AIG requests that the Court limit such production to manuals that pertain to motor vehicle accidents in effect at the time the underlying matter was handled and that were provided to the claims handlers involved in the handling of the underlying matter. Moreover, given the sensitive and proprietary nature of these documents, AIG requests that the Court enter an order that such documentation remain confidential, for distribution only to plaintiffs' counsel, the plaintiffs, and any experts retained by the plaintiffs, only as necessary to prosecute this action, and that all copies of such documents in the possession of the plaintiff, or plaintiffs' counsel, be returned to counsel for AIG at the conclusion of this litigation. See Jones v. Nationwide Ins. Co., 2000 WL 1231402 (M.D. Pa. July 20, 2000) (directing claim manuals to be kept confidential, for the eyes of the plaintiff's counsel only); Hamilton v. State Farm Mut. Auto. Ins. Co., 204 F.R.D. 420 (S.D. Ind. 2001) (court determined that claims handling materials constitute trade secrets, and ordered a modified protective order to protect the insurer's trade secrets and other confidential information).

IV. CONCLUSION

AIGDC and National Union request that, for the reasons set forth above, the court deny plaintiffs' Motion to Compel the Production of Documents in its entirety.

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Certificate of Service

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