COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. Superior Court
Civil Action
No.:05-1360-BLS2

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.	)

MEMORANDUM OF LAW IN SUPPORT OF AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC.'S AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO M.G.L. c. 231, § 118

Respectfully submitted,

PETITIONERS, AIG DOMESTIC CLAIMS, INC. F/K/A AIG TECHNICAL SERVICES, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

By their attorneys,

Mark E. Cohen

Mark E. Cohen, BBO #089800
Stephen D. Rosenberg,
BBO #558415
Robert J. Maselek,
BBO #564690
The McCormack Firm, LLC
One International Place
7th Floor
Boston, MA 02110
(617) 951-2929 Phone
(617) 951-2672 Fax

Brian P. McDonough

Anthony R. Zelle,
BBO #548141
Brian P. McDonough,
BBO #637999
Zelle McDonough LLP *(Co-Counsel)*
Four Longfellow Place
35th Floor
Boston, MA 02114
(617) 742-6520 Phone
(617) 973-1562 Fax

Dated: February 22, 2006

ARGUMENT

As grounds for the specific relief requested in their Petition, AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. ("AIGDC") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby incorporate by reference each of the arguments set forth within co-Defendant Zurich American Insurance Company's Memorandum of Law in Support of Its Petition for Interlocutory Relief Pursuant to M.G.L. c. 231, § 118. As additional support, AIGDC and National Union also state as follows:

The Massachusetts Rules of Civil Procedure provide special protection against disclosure of documents that a party or its representatives have prepared in anticipation of litigation. Under the Rules, discovery of an adversary's work product may not be had unless the party seeking the discovery proves (1) that he "has substantial need of the materials in the preparation of his case," and (2) that he "is unable without undue hardship to obtain

the substantial equivalent of the materials by other means." Mass. R. Civ. P. 26(b)(3).[1]

Bearing this in mind, in ordering that opinion work product of insurer claims personnel must be produced in this case, the Trial Court relied only upon two general propositions of Massachusetts law. First, it relied upon a notation within the Reporter's Notes to Rule 26(b)(3), providing that opinion work product "may be ordered disclosed 'in extremely unusual circumstances.'" (Order, p. 12, quoting the Reporter's Note.) Second, it relied upon *Ward v. Peabody*, which it read as identifying "at least one unusual circumstance in which opinion work product could be disclosed" as contemplated by the above Reporter's Note. (Order, p. 12, citing 380 Mass. 805, 818 (1980)). In *Ward*, the "unusual circumstance" was closely circumscribed:

> [I]n the singular instance[] when the activities of counsel are inquired into because they are at issue in the action before the Court, there is cause for

---

[1] Rule 26(b)(3) further provides that in ordering disclosure of work product when the required showing has been made, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," otherwise known as "opinion work product."

> production of documents that deal with such activities, though they are work product.

(Order, p. 12, quoting 380 Mass. at 818 (internal cite omitted)).

The Trial Court's decision conflicts with both the letter of Rule 26(b)(3), and the traditional construction given to the protections it affords to opinion work product:

> [A court] is also required by Rule 26(b)(3) to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or the representative of a party concerning the litigation." *Such "mental impressions" are considered "opinion" work product that should not be disclosed* <u>*under any circumstances*</u>.

49 Mass. Prac., Discovery, § 2.8 (emphasis supplied), citing *Hull v. Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Co.*, 414 Mass. 609, 615-16 (1993); see also, *National Employment Service Corp. v. Liberty Mut. Ins. Co.*, 1994 WL 878929 *3 (Mass.Super. 1994)("opinion work product, unlike ordinary work product, is not discoverable"). Moreover, it starkly contradicts the conclusion reached by a Single Justice of the Appeals Court who previously encountered the precise legal issues identified in Defendants' respective Petitions. See

Guevara v. Medical Professional Mut. Insurance Co., 2003 WL 23718323 (Mass.App.Ct. 2003).

In *Guevara*, upon full contemplation of *Ward*, Judge Mason made clear that "[t]here is no 'blanket exception' to the work product doctrine . . . . Rather, discovery of documents protected by the doctrine *still must be based on a particularized showing warranting such discovery* . . . ." 2003 WL 23718323 (internal cite omitted)(emphasis supplied). Therefore, even if the holding of *Ward* can be read to include identification of circumstances in which the production of mental impression work product might be warranted,[2] in no way can it be read to eliminate or diminish the importance of Rule 26(b)(3)'s requirement of a particularized showing of both need for the information, and inability to obtain it from other sources, before the documents can be rendered

---

[2] A dubious proposition; as Judge Mason noted:

> In *Ward*, the court held only that the documents at issue were not protected from discovery by the work product doctrine because there was no indication that they had been prepared in connection with any litigation and, further, they were essential to the plaintiff's case and the information could not be obtained from any other source.

Id. at n.2, citing *Ward*, 380 Mass. at 817-18 (emphasis supplied).

discoverable. *Id.* at n.2 ("The [*Ward*] Court nowhere suggested or implied that . . . the documents . . . would be automatically discoverable without a particularized showing of need and inability to obtain the information they contained from some other source.")

In this case, Plaintiffs made no effort to prove that the opinion work product of insurer claims personnel involved in determining the timing and amount of insurer settlement offers was not otherwise available without undue hardship. Plaintiffs could not, and cannot, make such a showing as the insurer claims personnel are available to be deposed – indeed, Plaintiffs have noticed their depositions. As such, the Trial Court's Order compelling production of opinion work product of insurer claims personnel, when the substantial equivalent can be obtained through depositions, is contrary to Rule 26(b)(3) and Massachusetts law, and requires reversal. See, *e.g.*, *Dyson v. Janson*, 2004 WL 3091644 (Mass.Super. 2004) ("Even assuming the [Plaintiffs] could satisfy the 'substantial need' prong of the test, they cannot establish the 'undue hardship' prong. Through deposition, the [Plaintiffs] have had the ability to

obtain the substantial equivalent of the material sought . . . ."); *Levine v. Marshall*, 1997 WL 416581 (Mass.Super 1997) ("The Court finds that the plaintiff is free to notice the deposition of the witnesses at issue and inquire directly as to their observations."), citing *Hickman v. Taylor*, 329 U.S. 495, 509 (1946)).

The Trial Court has suggested that it is unfair to "allow the plaintiffs to ask the claims representative today what he was thinking in 2004 . . . but deny the plaintiff access to the writings . . . that reflect what he was thinking . . . ." (Order, p. 13.) Nevertheless, the Legislature has determined the acceptability of such "unfairness" as necessary to effectuate the legitimate purposes behind the work product doctrine – namely, allowing parties and their representatives "to prepare their cases without fear that their efforts in doing so ultimately will be used against [them]." *Guevara*, 2003 WL 23718323 at *1; *cf.*, *Fleet National Bank v. Tonneson & Co.*, 150 F.R.D. 10, 15 (D. Mass. 1993) ("While it would no doubt provide a tremendous tactical advantage to an adversary to be able to pry into the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,' a

competent adversary will never need access to such information in order to prepare and present his or her case effectively.") (internal cite omitted)).

CONCLUSION

For the foregoing reasons, in addition to each of those set forth within the memorandum submitted in support of Zurich's Petition, AIGDC and National Union respectfully request this Court to GRANT their Petition and to REVERSE the Trial Court's Order as requested in their Petition.

CERTIFICATE OF SERVICE

I, Brian P. McDonough, certify that on this 22nd day of February, 2006, I caused a copy of the foregoing to be served by hand upon:

Margaret M. Pinkham
Brown, Rudnick Berlack Israels LLP
One Financial Center
Boston, MA 02111
617-856-8265
Counsel for Marcia Rhodes, Harold Rhodes and Rebecca Rhodes

Robert J. Maselek, Jr.
The McCormack Firm
One International Place
Boston, MA 02110
617-951-2929
Co-Counsel for AIG Domestic Claims, Inc. and National Union Fire Ins. Co.

Danielle Andrews Long
Robinson & Cole LLP
One Boston Place
Boston, MA 02108
(617) 557-5900
Counsel for Zurich American Insurance Co.

Brian P. McDonough

Brian P. McDonough