

# ROBINSON & COLE LLP

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*Via Facsimile and U.S. Mail*

September 7, 2005

Margaret M. Pinkham, Esq.  
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One Financial Center  
Boston, MA 02111

Re: Marcia Rhodes, Harold Rhodes, et al. v. AIG Domestic Claims, Inc. et al.  
Suffolk Superior Court Civil Action No. 05-1360-BLS

Dear Ms. Pinkham:

As you may know, my colleague Danielle Andrews Long and I engaged in a Rule 9C discovery conference with Cheryl Pinarchick of your office on Friday, September 2, 2005 in an effort to narrow the areas of disagreement reflected in Plaintiff's Motion to Compel Documents from Zurich American Insurance Company ("Zurich"). During that conference, I informed Ms. Pinarchick that upon further review of the materials withheld on the basis of privilege, and in the interest of compromise, Zurich American Insurance Company ("Zurich") has agreed to produce some additional documents from its claim file. We are assembling those documents and expect to send them to your office later this week or early next week. Also, during our Rule 9C conference, Ms. Pinarchick expressed a willingness to reconsider Plaintiffs' position as to certain of the other documents that Zurich has redacted and withheld. Toward that end, Ms. Pinarchick requested a letter from us setting forth: (i) a further explanation of the roles the various law firms played in the underlying claim and tort action; and (ii) the categories of communications we claim as privileged and the reasons therefore. This letter is sent in response to Ms. Pinarchick's request. Based on my conversation with Ms. Pinarchick, it is my expectation that the contents of this letter will be considered in good faith, and will serve to narrow the scope of the dispute to be presented to Judge Gants on September 16<sup>th</sup>.

## I. Identity of the Players

On page 2 of the privilege log produced in connection with Zurich's Response to Plaintiffs' First Request for Production of Documents, we set forth the identity of



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all parties whose names appeared in the documents contained in Zurich's files, together with an explanation of their respective roles in the underlying controversy. Since Ms. Pinarchick has asked for additional explanation, we offer the following:

1. Crawford & Company: At all relevant times, Crawford was the third-party administrator that oversaw the underlying claim and litigation on behalf of Zurich and GAF. As such, Crawford was clearly Zurich's agent.
2. Nixon Peabody: The law firm of Nixon Peabody was retained directly by Building Materials Corp. of America d/b/a GAF Materials Corp. ("GAF") to defend GAF in the underlying action. After receiving notice of Mrs. Rhodes' automobile accident in or about January 2002, Zurich began interacting with Nixon Peabody, GAF's chosen defense counsel. Eventually, Zurich began paying for GAF's defense pursuant to the subject insurance policy.
3. McCarter & English, LLP: At all relevant times, the law firm of McCarter & English ("McCarter") served as private counsel to GAF, particularly with respect to matters of insurance coverage and strategy for defending the underlying tort action.
4. Campbell, Campbell, Edwards & Conroy: As of April 16, 2004, AIG Domestic Claims Technical Services, Inc. ("AIG") had retained the law firm of Campbell, Campbell, Edwards & Conroy ("Campbell") to work with Nixon Peabody in defending GAF in the underlying tort action.
5. Corrigan, Johnson & Tutor, P.A.: On or about April 8, 2003, Zurich agreed to pay for the defense of Penske Truck Leasing Co., LP ("Penske"), in the underlying tort action. The law firm of Corrigan, Johnson & Tutor, P.A. ("Corrigan") was retained to represent Penske in that action, and Zurich thereafter paid for Corrigan's legal services.
6. Morrison Mahoney LLP, f/k/a Morrison Mahoney & Miller, LLP: On or about March 7, 2003, Zurich agreed to pay for the defense of Driver Logistics, Inc. ("DLS") and Carlo Zalewski in the underlying action, and Morrison Mahoney was retained to represent those defendants. Zurich thereafter paid for Morrison Mahoney's legal services.
7. Taylor, Duane, Barton & Gilman, LLP: At all relevant times, Taylor, Duane served as Zurich's outside insurance coverage counsel.

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8. Gallagher Basset Services, Inc.: In the fall of 2004, Gallagher Basset Services, Inc. ("Gallagher") replaced Crawford & Company as the independent adjusting firm facilitating the underlying claim for Zurich. It was clearly an agent of Zurich.

9. Willis of New York: At all relevant times, Willis was the insurance broker for GAF and was involved in monitoring the status of its claim under the Zurich policy, as well as the underlying tort action.

## II. Claims of Privilege

In the Motion to Compel, you have requested that Zurich produce its entire "claim file" in unredacted form. As I explained to Ms. Pinarchick, the "claim file" encompasses of the documents we have already produced, plus all documents described in our privilege log. Your demand, therefore, includes privileged communications between Zurich and its lawyers which are not discoverable.

As a threshold matter, there can be little doubt that communications between Zurich and its coverage counsel, Taylor Duane, are privileged insofar as they relate to the rendition of legal services directly to and for the benefit of Zurich. That privilege extends, of course, to communications between Taylor Duane and Crawford, Zurich's agent. The same privilege applies with equal force to communications between Zurich and Robinson & Cole LLP on the subjects of Plaintiff's demand pursuant to Chapter 93A and this litigation.

As you know, Zurich has claimed privilege with respect to an array of documents containing discussions of litigation strategy, the mental impressions of defense counsel reporting to and paid by Zurich, and similar matters. The following is a description of the these communications by category and a brief explanation of why they are protected from disclosure:

1. Communications between Morrison Mahoney, Zurich and/or Crawford: As noted above, Zurich paid for the defense of DLS and Zalewski. Defense counsel, Morrison Mahoney, often communicated with Crawford and Zurich on matters of litigation strategy. We have withheld these communications on the basis of the attorney-client privilege and work product.

2. Communications between Corrigan, Crawford and Zurich: Similarly, the Corrigan firm, which was paid by Zurich, corresponded with Crawford and Zurich

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on matters of litigation strategy in their representation of Penske. These communications were likewise withheld, and in some cases redacted, on the basis of the attorney-client privilege and the work product immunity.

3. Communications between and among Nixon Peabody, Crawford, Zurich, GAF and McCarter: Since Nixon Peabody was paid by Zurich to represent GAF in the underlying action, we have withheld communications regarding litigation strategy, developments in the litigation and related matters based on the attorney-client privilege and common interest privilege. We will, however, produce communications among these parties that do not relate to matters of litigation strategy.

4. Communications among McCarter, Nixon Peabody, AIG, Campbell, GAF and Zurich: As explained above, McCarter, Nixon Peabody and Campbell represented the interests of GAF in the underlying tort litigation, so there can be no doubt that they shared a common interest in protecting GAF against a judgment in that action. Zurich and AIG, which insured GAF's liabilities and to which the law firms representing GAF reported, had the same interest in defending GAF against the underlying tort claims. Therefore, communications by and between the aforementioned law firms and companies are protected by the attorney-client privilege and common interest privilege to the extent that they relate to the defense of the underlying tort action. The mere fact that Zurich and AIG had different levels of exposure based on the limits of their respective insurance policies did not give them divergent interests with respect to the underlying litigation. Moreover, contrary to the assertion in Plaintiffs' Motion to Compel, the absence of an executed "joint defense agreement" among the aforementioned parties does not defeat the common interest/joint defense privilege. Communications among these parties (or excerpts of such communications) that do not relate to litigation strategy will be produced to Plaintiffs to the extent they have not been produced already.

In closing, I must emphasize that we have offered the explanations set forth in this letter with the goal of forging a compromise on the matters addressed in Plaintiff's Motion to Compel. I sincerely hope that you and your colleagues will reevaluate your client's position and narrow the scope of your document requests so that only genuine disputes will be brought before Judge Gants. After reviewing this letter, please contact me as soon as possible to continue our mandatory Rule 9C conference.

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Thank you for your anticipated cooperation.

Very truly yours,

  
Gregory P. Varga

Copy to: M. Frederick Pritzker, Esq.  
Cheryl Pinarchick, Esq.  
Stephen J. Abarbanel, Esq.  
Danielle Andrews Long, Esq.

