

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

**AMENDMENT TO COMMISSIONER'S AND LIQUIDATOR'S EMERGENCY
MOTION FOR EXPEDITED DECISION OR HEARING ON MOTION FOR ORDER
GOVERNING CONFIDENTIALITY OF REGULATORY DOCUMENTS**

Roger A. Sevigny, both as New Hampshire Insurance Commissioner and as Liquidator of The Home Insurance Company (“Home”) (collectively “Commissioner”), hereby amends his Emergency Motion for Expedited Decision or Hearing on Motion for Order Governing Confidentiality of Regulatory Documents (“Emergency Motion”), which was filed February 9, 2010, as follows:

1. In paragraph 1 of the Emergency Motion, the Commissioner noted that the plaintiffs in the California litigation had raised the same issues in a Motion to Compel filed in the California litigation as had been raised in his Motion for Order Governing Confidentiality of Regulatory Documents filed October 30, 2009 (“Motion”) and that the Motion to Compel was scheduled be to heard on February 26, 2010. The Commissioner has now been informed that the Motion to Compel has been re-filed and is scheduled to be heard on March 10, 2010. See Plaintiffs’ Memorandum of Points and Authorities in Support of the Motion to Compel attached as Exhibit A. The Commissioner reiterates and renews his request that this Court issue a decision or set the Motion for an expedited hearing prior to the hearing on the Motion to Compel or prior to March 10, 2010.

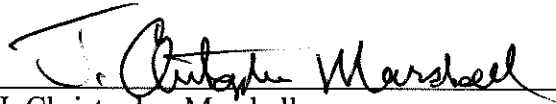
WHEREFORE, the Commissioner requests that this Court:

- A. Note its amendment to the Emergency Motion;
- B. Either issue an expedited decision on the Commissioner's Motion for Order Governing Confidentiality of Regulatory Documents or set that Motion for a hearing prior to March 10, 2010; and
- C. Grant such further relief as justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
HAMPSHIRE AND LIQUIDATOR OF THE
HOME INSURANCE COMPANY,

By his attorneys,
MICHAEL A. DELANEY,
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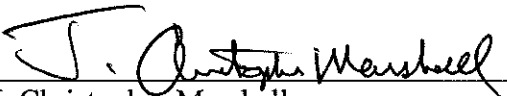


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amendment to Commissioner's and Liquidator's Emergency Motion for Expedited Decision or Hearing on Motion for Order Governing Confidentiality of Regulatory Documents was sent this 18th day of February 2010, by first class mail, postage prepaid, to all persons on the attached service list and by email to counsel for the California plaintiffs, Zurich and REM.



J. Christopher Marshall

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STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

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12 FULLER-AUSTIN ASBESTOS
13 SETTLEMENT TRUST, *et al.*,

Plaintiffs,

vs.

15 ZURICH-AMERICAN INSURANCE
16 COMPANY, individually and as successor
17 to Zurich Insurance Company, *et al.*,

Defendants.

Case No. CGC 04-431719
Case No. CGC 04-436181
Case No. CGC 05-442140
Case No. CGC 05-442745

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THE MOTION TO
COMPEL THIRD-PARTY RISK
ENTERPRISE MANAGEMENT,
LIMITED TO FURTHER PRODUCE
DOCUMENTS AND PRODUCE A
WITNESS FOR FURTHER DEPOSITION
TESTIMONY**

Date: March 10, 2010
Time: 9:30 a.m.
Dept.: 304
Judge: Hon. Richard A. Kramer

22 WESTERN ASBESTOS SETTLEMENT
23 TRUST, *et al.*,

Plaintiffs,

vs.

25 ZURICH-AMERICAN INSURANCE
26 COMPANY, individually and as successor
27 to Zurich Insurance Company, *et al.*,

Defendants.

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PEPSIAMERICAS, INC., *et al.*,
Plaintiffs,
vs.
ZURICH-AMERICAN INSURANCE
COMPANY, individually and as successor
to Zurich Insurance Company, *et al.*,
Defendants.

PNEUMO ABEX LLC,
Plaintiff,
vs.
ZURICH-AMERICAN INSURANCE
COMPANY, individually and as successor
to Zurich Insurance Company, *et al.*,
Defendants.

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1 **I. INTRODUCTION**

2 On June 8, 2007, Plaintiffs subpoenaed business records from Zurich-affiliated third party
3 Risk Enterprise Management, Limited (“REM”). *See* Declaration of Elham Marder in Support of
4 Motion to Compel Third-Party Risk Enterprise Management, Limited to Further Produce
5 Documents and Produce a Witness for Further Deposition Testimony (“Marder Decl.”) at ¶ 3,
6 Exh. 1. Plaintiffs sought the records because REM, an entity created by Zurich as part of the so-
7 called “Recapitalization,” is integral to several of Plaintiffs’ fraudulent transfer claims.

8 After a two year delay and associated motion practice,¹ REM begrudgingly completed its
9 document production² and thereafter took three additional months to provide Plaintiffs with its
10 various privilege logs.³ These privilege logs indicate that REM has taken every liberty in
11 shielding documents from production based on inapplicable statutory confidentiality claims as
12 well as unsupported and untenable claims of attorney-client privilege and work product
13 protection.

14 REM first claims, based on self-serving interpretation of various New Hampshire statutes,
15 that various statutory provisions – RSA 400-A:37, RSA 401-B:7, and RSA 404-F:8 – absolve
16 REM, a private party, of its discovery obligations to the Home Insurance Company (the “Home”)
17 policyholders.⁴ In fact, the plain language of the statutes as well as their legislative history
18 demonstrates that, at best, the statutes were enacted to protect an insurer’s commercially sensitive
19

20 ¹ In June 2009, Plaintiffs moved to compel REM to comply with the deposition subpoena for
21 production of business records, because REM had not yet completed its document production two
22 years after the issuance of the subpoena and six months before the initial Phase I Trial date.

23 ² REM has supplemented its production with documents released from its privilege logs as
24 recently as January 29, 2010.

25 ³ REM provided a document containing a redaction log and two separately identified privilege
26 logs. The first is entitled “Privilege Log” and contains attorney-client communication, attorney
27 work product, and New Hampshire statutory privilege claims. The other is entitled “Home
28 Privilege Log” and contains largely New Hampshire statutory confidentiality claims. The
“Redaction Log,” “Privilege Log” and the “Home Privilege Log” are collectively referred to as
the “privilege logs.” REM provided its privilege logs on September 3, 2009, supplemented on
November 6, 2009, and amended on December 9, 2009. Marder Decl. at ¶¶ 5-7, Exhs. 3-5.

⁴ REM asserts that it invokes these statutory provisions with “input” and confirmation from the
New Hampshire Liquidator.

1 business information from competitors when such information is shared with the New Hampshire
2 Insurance Commissioner.⁵ The statutes were not enacted to preclude policyholders from
3 obtaining relevant information from an insurer pursuant to a subpoena and with all necessary
4 confidentiality assured through a stipulated protective order. The legislative history of these
5 statutes makes clear their purpose is to protect the public and policyholders.

6 Moreover, even after REM's provision of several "Privilege Logs," REM has still failed to
7 meet its burden in establishing that hundreds of documents are protected by the attorney-client
8 privilege and/or work product doctrine. REM's own "Privilege Log" suggests these documents
9 are not privileged and REM has not provided further information supporting its privilege claims.⁶
10 Also, REM's Redaction Log is unintelligible. Plaintiffs must guess which privileges are
11 asserted.⁷ Accordingly, Plaintiffs move to compel REM to release certain documents from its
12 amended supplemental "Privilege Log," "Home Privilege Log" and "Redaction Log."

13 Lastly, REM should be compelled to produce a witness for further deposition testimony,
14 pursuant to the Deposition Subpoena for Personal Appearance, served on September 21, 2009.
15 Marder Decl. at ¶ 22, Exh. 20. Plaintiffs' took the corporate deposition of REM on December 10,
16 2009, and since that date REM has released documents for which it previously asserted a
17 privilege. REM should be compelled to provide a witness for further deposition testimony on
18 these documents as well as any documents released pursuant to this Motion to Compel.

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21 ⁵ Moreover, REM is not an insurer, and its basis for asserting the statutory provisions is unclear.
22 In addition, these are "confidentiality" provisions that REM broadly construes to assert privilege.

23 ⁶ REM now asserts non-privilege objections to several documents initially placed on its privilege
24 log, furthering the confusion regarding the proper withholding of these documents. REM's
25 objections are without merit and/or vague and require further clarification.

26 ⁷ It is unclear whether REM is asserting the attorney-client communication privilege, the New
27 Hampshire statutory provisions, or a "settlement discussion" privilege to redact documents.
28 Regardless, REM's privilege assertions fail. To the extent REM is relying on the attorney-client
privilege, the redaction log identifies third parties on the correspondence, which waives the
attorney-client privilege, or there is insufficient author/recipient information to substantiate
REM's attorney-client privilege claim. Also, REM's reliance on the New Hampshire statutory
provisions misplaced and its settlement discussion assertion is vague and ambiguous.

1 **II. MEET AND CONFER**

2 On June 8, 2007, Plaintiffs served a Deposition Subpoena for Production of Business
3 Records on REM ("Subpoena"). Marder Decl. at ¶ 3, Exh. 1. After obtaining an extension, REM
4 served its responses and objections to the Subpoena on July 27, 2007. Marder Decl. at ¶¶ 4, 9,
5 Exhs. 2, 7. REM agreed to produce documents to certain categories, and Plaintiffs agreed to
6 allow REM to produce documents on a rolling basis. Marder Decl. at ¶¶ 4, 9, Exhs. 2, 7. By
7 December 2008, nearly a year and a half later, REM had only produced 744 pages of documents.
8 Marder Decl. at ¶ 7, Exh. 9. Two years after the Subpoena was issued, REM still had not
9 completed its document production. In June 2009, Plaintiffs moved to compel REM to complete
10 its document production by July 6, 2009. Marder Decl. at ¶ 10, Exh. 8. REM stated its July 17,
11 2009 production completed its document production and provided its privilege logs on September
12 3, 2009.

13 On October 7, 2009, Plaintiffs prepared meet-and-confer correspondence to REM
14 requesting further clarification for the privilege logs and a telephonic meet and confer. Marder
15 Decl. at ¶ 11, Exh. 9. Plaintiffs and REM telephonically met and conferred on October 19, 2009.
16 Marder Decl. at ¶ 12, Exh. 10. REM agreed to provide supplemental privilege logs with more
17 specific document descriptions. REM also agreed to provide a separate list identifying the title
18 and employer of persons listed on the privilege logs. REM also stated it would provide further
19 clarification regarding its statutory confidentiality assertions.

20 On November 6, 2009, REM released some documents from its privilege log and provided
21 supplemental privilege logs and an identification chart for persons listed on the supplemental
22 privilege logs. Marder Decl. at ¶¶ 6, 8, Exhs. 4, 6. While these supplemental documents assisted
23 in verifying REM's privilege claims as to certain documents, Plaintiffs continued to question
24 REM's privilege claims for the rest of the documents on the privilege logs. REM provided no
25 further clarification as to its New Hampshire statutory confidentiality claims. Moreover, REM
26 stated that it would amend the supplemental Privilege Log as it found several documents.

27 On December 9, 2009, REM released a few more documents from its supplemental
28 Privilege Log and provided amended supplemental privilege logs. Marder Decl. at ¶ 7, Exh. 5.

1 Plaintiffs prepared further meet-and-confer correspondence on December 23, 2009 regarding
2 concerns with REM's privilege claims. Marder Decl. at ¶ 13, Exh. 11. Plaintiffs' requested a
3 telephonic meet and confer and that the parties agree upon a date and time by December 31, 2009.

4 REM never responded to Plaintiffs' December 23, 2009 correspondence. Accordingly,
5 Plaintiffs sent follow-up meet and confer correspondence on January 5, 2010. Marder Decl. at ¶
6 14, Exh. 12. Plaintiffs again requested a telephonic meet and confer.

7 REM responded on January 5, 2010 and requested to provide a written response to the
8 issues raised in Plaintiffs' December 23, 2009 and January 5, 2010 correspondence before
9 engaging in a telephonic meet and confer as requested by Plaintiffs. Marder Decl. at ¶ 15, Exh.
10 13. Plaintiffs agreed but requested that REM provide its written response by January 14, 2010,
11 to allow time for a subsequent telephonic meet and confer. Marder Decl. at ¶ 16, Exh. 14. On
12 January 12, 2010, REM asked for an extension to January 22, 2010 to provide its written response
13 to which Plaintiffs agreed. Marder Decl. at ¶¶ 17-18, Exh. 15-16.

14 REM did not meet its own January 22, 2010 deadline. REM did not provide its written
15 response to Plaintiffs' meet and confer correspondence until January 29, 2010, over a month after
16 the initial letter. Marder Decl. at ¶ 19, Exh. 17. REM released an additional 300 pages from its
17 amended supplemental "Privilege Log," but hardly addressed the concerns raised in Plaintiffs'
18 December 23, 2009 letter. Instead, the thrust of REM's response was that it was still reviewing
19 documents in light of the issues raised by Plaintiffs and finding previously un-located documents,
20 but without any indication as to when that would be done.

21 Plaintiffs agreed to continue meet-and -confer efforts with REM to the extent fruitful.
22 Marder Decl. at ¶ 20, Exh. 18. REM agreed to a February 18, 2010 deadline for Plaintiffs'
23 motion to compel on the privilege logs issues.⁸ Marder Decl. at ¶ 21, Exh. 19. REM and
24 Plaintiffs, however, have reached an impasse on the statutory confidentiality claims. Moreover,

25 _____
26 ⁸ Although REM amended its supplemental privilege logs on December 9, 2009, Plaintiffs
27 conservatively calculated their Motion to Compel deadline from November 6, 2009, when REM
28 provided its supplemental privilege logs. Accordingly, under the Case Management Order No. 1,
which REM has asserted applies to it, Plaintiffs' motion to compel deadline was February 4,
2010. Marder Decl. at ¶¶ 31-32, Exhs. 29 (Case Management Order at 1-2), 30.

1 REM has given no indication as to when it will provide further clarification and information as to
2 its attorney-client communication and attorney work product claims. It's notable that these
3 matters relate to a document production pursuant to a subpoena that was issued in June 2007 and
4 following a motion to compel in June 2009. Given the amount of time it has already taken REM
5 to respond to this subpoena and the fast approaching Phase I Trial date, Plaintiffs cannot delay
6 any further addressing the concerns set forth in this Motion to Compel. Plaintiffs will withdraw
7 their Motion to Compel as to any issues that may be resolved through the continuing meet-and-
8 confer process.

9 Plaintiffs properly brought this Motion to Compel before Justice Kay, whom the Court has
10 Ordered to "hear all discovery disputes in connection with the Phase I Trial," including motions
11 to compel and subpoenas. Marder Decl. at ¶ 31, Exh. 29 at 4:1-3. REM, however, objected to the
12 Order and refused to proceed before Justice Kay, despite procedural safeguards providing for
13 Judge Kramer's independent review of the Discovery Referee's recommended orders. Marder
14 Decl. at ¶ 31, Exh. 29 at 5:7-8. In turn, REM has already invoked other Orders in this action,
15 including the Protective Order and the Case Management Order, to its benefit in discovery
16 disputes with Plaintiffs. Marder Decl. at ¶¶ 23, 32, Exhs. 21 at 244:25-245:17, 30. REM rejects
17 and invokes Orders in this action to serve to its benefit. REM's self-serving approach is also
18 evident in its document production and privilege assertions.

19 **III. ARGUMENT**

20 **A. The New Hampshire Statutory Provisions Do Not Remove REM's Discovery**
21 **Obligations.**

22 The New Hampshire Insurance Code provisions RSA 400-A:37, RSA 401-B:7, and RSA
23 404-F:8 provide for the confidentiality of certain information filed with, produced to, obtained by,
24 or disclosed to the New Hampshire Insurance Commissioner ("Commissioner").

25 RSA 400-A:37 (IV)(a) provides for the confidentiality and privilege
26 of "documents, materials, or other information, including, but not
27 limited to, all working papers, and copies thereof created, produced
28 or obtained by or disclosed to the commissioner or any other person
in the course of an examination made under this title, or in the
course of analysis by the commissioner of the financial condition or
market conduct of a company." Marder Decl. at ¶ 24, Exh. 22.

1 RSA 401-B:7 provides for the confidential treatment of “all
2 information, documents, and copies thereof obtained or disclosed to
3 the commissioner or any other person in the course of an
4 examination or investigation.” Marder Decl. at ¶ 26, Exh. 24.

5 RSA 404-F:8 provides for the confidentiality of “all RBC reports,
6 to the extent the information therein is not required to be set forth in
7 a publicly available annual statement schedule, and RBC plans,
8 including the results or report of any examination or analysis, with
9 respect to any domestic insurer or foreign insurer which are filed
10 with the commissioner.” Marder Decl. at ¶ 28, Exh. 26.

11 REM, at the directive of the New Hampshire Insurance Liquidator for the Home, broadly
12 construes these New Hampshire Insurance Code provisions to contend that certain documents are
13 privileged by virtue of the New Hampshire Insurance Department’s “oversight” and
14 “supervision” of the Home. REM, however, improperly invokes these statutes, construing them
15 beyond, even opposite to, their intended purpose.² REM should be compelled to produce all
16 documents withheld based on these statutory provisions.

17 1. The Intended Purpose of the New Hampshire Statutes is the Free Flow of
18 Information between Insurers and the Commissioner

19 The intended purpose of the confidentiality provisions in RSA 400-A:37, RSA 401-B:7,
20 and RSA 404-F:8 is to encourage the free flow of information – including financial information –
21 from insurers to the Commissioner, which regulates those insurers and aims to insure that the
22 insurers remain solvent. By removing the fear that information disclosed to the Commissioner
23 may become publicly-available, and therefore the subject of competitive intelligence efforts, the
24 New Hampshire statutes afford insurers comfort that the required submission of information does
25 not result in competitive harm. RSA 404-F:8 specifically states that information provided to the

26 ² For example, for Document No. 425 on its amended supplemental “Privilege Log,” REM
27 asserts the statutes to preclude the production of a letter from the Commissioner to “REM/Home
28 General Counsel” enclosing the (1) Consulting Agreement appointing Mike Averill as the New
Hampshire Insurance Department representative responsible for monitoring the Home, (2) a letter
from the Commissioner to Mike Averill authorizing him to act as the New Hampshire Insurance
Department representative appointed to Home, and (3) a letter from the Commissioner to REM
regarding Mike Averill’s supervision authority. These documents, however, are not Home or
REM documents that were filed with, produced to, obtained by, or disclosed to the Commissioner
as provided for under the New Hampshire provisions. Moreover, to the extent REM is invoking
these statutes to protect the Home from policyholders, it is misusing the provisions against their
intended purpose, which is to protect the public and policyholders.

1 Commissioner shall be kept confidential by the Commissioner as “it might be damaging to the
2 insurer if made available to its competitors.”

3 REM’s reliance on the statutes to block discovery to Plaintiff policyholders makes no
4 sense. To begin with, Plaintiffs do not seek documents from the Commissioner. Plaintiffs seek
5 documents directly from REM. Neither do Plaintiffs seek discovery specifically as to documents
6 or information disclosed to the New Hampshire Commissioner. The mere fact that a document
7 has been disclosed to the Commissioner does not make it privileged. By way of analogy, the
8 attorney-client privilege protects communications between an attorney and a client, but the facts
9 underlying those communications are not privileged. *State Farm Fire and Casualty Co. v. Sup.*
10 *Ct.*, 54 Cal. App. 4th 625, 639 (1997). A fact does not become privileged merely because it was
11 communicated to an attorney. Likewise, that REM’s documents were given to the Commissioner
12 does not provide them with any greater protection than they would have otherwise.¹⁰
13 Accordingly, the New Hampshire statutory provisions do not remove REM’s discovery
14 obligations.

15 Furthermore, the confidentiality provisions were not intended to protect against disclosure
16 in these circumstances. Here, the Home is insolvent and has entered liquidation. There is no
17 concern regarding a competitive disadvantage. The Commissioner has essentially become the
18 Home. Withholding such documents does not aid in the free flow of information between the
19 Home and the Commissioner. Moreover, even if the Home were not insolvent, there is no party
20 to this litigation that is either the Home’s or REM’s competitor, and there is a protective order
21 that can adequately protect such documents against disclosure beyond parties to this litigation.
22 Accordingly, these confidentiality provisions do not remove REM’s discovery obligations.

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25 ¹⁰ These statutory provisions merely provide the *same* confidentiality and privilege to documents
26 obtained by or disclosed to the Commissioner as if the documents were still in the possession of
27 the Home. To the extent the documents were not already privileged, the documents do not
28 become privileged by disclosing them to the Commissioner. To the extent the documents were
not already confidential, the documents do not become confidential by disclosing them to the
Commissioner. In turn, if the documents are confidential, there is a stipulated protective order in
this action that will ensure the confidentiality of these documents.

1 2. The Intended Purpose of the Confidentiality Provisions is to Protect
2 Shareholders

3 The legislative history for in RSA 400-A:37, RSA 401-B:7, and RSA 404-F:8 makes clear
4 these statutes are intended to protect *policyholders* and the *public*. The confidentiality provisions
5 are merely a mechanism to assist in the exchange of information between insurers and the
6 Commissioner, enabling the Commissioner thereby to better protect the public and policyholders.

7 Specifically, the legislative history for RSA 400-A:37 states that the purpose of the statute
8 is to “strengthen the ability of the insurance department to protect the public.” Marder Decl. at ¶
9 25, Exh. 23 (Journal of the House, House Bill 649, page 1198).

10 The legislative history for RSA 401-B:7 states, this is a “model act to protect the public
11 against insurance holding companies.” In addition, RSA 401-B:7 expressly provides for the
12 disclosure of information when “the interest of policyholders . . . will be served by the publication
13 thereof.” Marder Decl. at ¶ 27, Exh. 25 (Journal of the House, House Bill 648, page 648).

14 Lastly, the legislative history for RSA 401-B:7 makes clear the bill was intended to give
15 statutory ability to deal with insolvency of insurers and states, “if capital falls below certain
16 levels, then the insurance department can step in and take steps to protect policyholders.” Marder
17 Decl. at ¶ 29, Exh. 27 (House Committee Public Hearing Minutes on Senate Bill 32 on March 23,
18 1995).

19 Here, however, REM is using the confidentiality provisions against the interest of
20 policyholders—that is, the Plaintiffs. To allow REM to use these statutory provisions to withhold
21 relevant documents in this litigation turns the statutes on their heads and should not be permitted.

22 **B. REM’s Attorney-Client Privilege Claims Fail for Documents that Do Not**
23 **Involve Attorneys and Clients.**

24 The attorney-client privilege protects communications between an *attorney* (or an
25 *attorney’s agent*) and a *client* (or a *client’s agent*). Cal. Evid. Code § 952. Therefore,
26 communications not involving an attorney (or an attorney’s agent) are inherently not attorney-
27 client communications and are not privileged. Similarly, communications not involving a client
28 (or a client’s agent) are inherently not attorney-client communications and are not privileged.

1 REM's amended supplemental "Privilege Log," however, is interspersed with documents
2 in which no REM attorney (or an agent of a REM attorney) and/or no REM personnel (or REM
3 agent) are involved in the communication.

4 For example, Document Nos. 197 and 198 on the amended supplemental "Privilege Log"
5 are emails from Michael Riney (REM EVP, Claims) to Tom Kober (REM VP, Claims), Paula
6 Maguire (REM SVP, Claims), Kevin Kelly (VP, Claims), and Michael Brambier (VP, Claims).
7 The communications do not involve a REM attorney. Neither are the people identified seemingly
8 agents for a REM attorney. Also, Document No. 425 on the amended supplemental "Privilege
9 Log" is communication between Paula Rogers of the New Hampshire Insurance Department and
10 Roger Moak, REM General Counsel. Paula Rogers is neither a REM employee nor agent.
11 Therefore, REM's attorney-client communication assertion is baseless for these documents.¹¹

12 In its January 29, 2010 correspondence,¹² REM asserts these documents are privileged
13 because they contain (1) privileged hand written notes by REM General Counsel Roger Moak, (2)
14 handwritten notes seeking legal advice directed to Roger Moak, or (3) information protected by
15 statutory privilege. Marder Decl. at ¶ 19, Exh. 17.

16 If REM's attorney-client communication claims are based on handwritten notes, copies of
17 these documents should still be released with the privileged handwritten notes redacted.¹³

18 **C. REM's Attorney Work Product Privilege Claims Fail for Documents Not**
19 **Authored by an Attorney.**

20 The Discovery Act refers only to the work product of an *attorney* (or an *attorney's agent*)
21 acting on a client's behalf. Cal. Civ. Proc. Code § 2018.010 et seq. Accordingly, documents not
22 authored by an attorney or by an attorney's agent are not protected by the attorney work product

23 ¹¹ On similar grounds, REM's attorney-client communication privilege assertions are also
24 improper for Document Nos. 24, 51, 228, 230, 234, 236, 310, 414-416, 450-451, 466-467, 470,
25 474-475, 477, 479, 483, 508, 512, 515-518, 522-526, 532, 540-541, 544, 551-552, 573, 581-582,
608, 612-615, 645, 715, and 729-731.

26 ¹² This information was NOT included on the amended supplemental "Privilege Log." This after
27 the fact explanation begs the question as to why such information was not originally provided.

28 ¹³ For reasons discussed in Section III.A above, the New Hampshire statutory privileges do not
prevent the disclosure of these documents.

1 doctrine.

2 REM, however, improperly invokes the attorney work product doctrine for documents that
3 are not authored by a REM attorney. Nor is there any suggestion the authors of such documents
4 are the agents of a REM attorney. For example, Document No. 425 on the amended supplemental
5 "Privilege Log" identifies a letter prepared by Paula Rogers of the New Hampshire Insurance
6 Department. The letter encloses the Consulting Agreement between the New Hampshire
7 Insurance Department and Mike Averill and correspondence prepared by the New Hampshire
8 Insurance Department to Mike Averill and REM concerning the appointment of Mike Averill as
9 Representative. Paula Rogers is not a REM attorney nor an agent of a REM attorney. An
10 attorney work product claim for this document clearly fails.

11 Without any further clarification, in its January 29, 2010 letter, REM asserts these
12 documents are privileged because they contain (1) attorney-client privileged communications, (2)
13 attorney work product, *or* (3) information protected by statutory privilege. Marder Decl. at ¶ 19,
14 Exh. 17. It is NOT sufficient for REM to list various privileges that "might" apply and leave
15 Plaintiffs to guess as to which privilege it intends to assert. REM needs to state with specificity
16 the privileges asserted as statutorily required. See Cal. Civ. Proc. Code § 2031.240.

17 These documents are not authored by an attorney (or an attorney's agent), and therefore
18 are clearly not attorney work product.¹⁴ REM's attorney-client privilege fails for many of these
19 documents because (1) the document description suggests the provision of non-legal services, (2)
20 the communication involved third parties, and/or (3) no REM attorney (or an agent of a REM
21 attorney) and/or no REM personnel (or REM agent) are involved in the communication.¹⁵
22 Accordingly, REM should be compelled to produce Document Nos. 3-4, 24, 42-45, 49-50, 54-73,

23
24 ¹⁴ REM's attorney work product claim is without merit for Document Nos. 2-4, 17, 23-25, 27, 35,
25 42-45, 49-50, 54-73, 76, 80-85, 88-91, 95, 97-98, 102-104, 106-110, 114-116, 119-121, 133-134,
26 137, 140, 144-145, 149, 162, 179, 184, 189-190, 195, 197-198, 205, 221, 228, 230, 234, 236, 310,
27 410, 415-416, 421-425, 428, 432, 446-447, 452, 458-459, 464-466, 472, 474-475, 484, 496-497,
28 501-502, 505-506, 508-513, 515-517, 520-522, 524-526, 532-533, 536, 538, 543, 554, 570, 591,
595, 604, 622, 625, 639, 642, 657, 668, 673, 677, 680, 689, 721, 733, and 736.

¹⁵ Furthermore, for reasons discussed in Section III.A., the New Hampshire statutory privileges do not prevent the disclosure of these documents.

1 76, 82-83, 89-90, 98, 102-103, 107, 114-116, 119-121, 133-134, 140, 179, 197-198, 205, 228,
2 230, 234, 236, 310, 416, 421-425, 428, 446-447, 459, 464, 466, 472, 474-475, 501-502, 505-506,
3 508-509, 512, 515-517, 520-522, 524-526, 532-533, 543, and 639.

4 **D. REM Waived its Attorney-Client Communication and/or Attorney Work**
5 **Product Privilege Claims by Disclosing to Third Parties.**

6 Both the attorney-client privilege and attorney work product doctrine are subject to waiver
7 if the protected information is disclosed to certain third parties. Specifically, the attorney-client
8 privilege only applies to confidential communications. There is no protection for
9 communications involving third parties who are not essential to furthering the client's interests.
10 Cal. Evid. Code § 952. The attorney work product doctrine is waived when the work product is
11 disclosed to third persons with no interest in maintaining its confidentiality. *Laguna Beach*
12 *County Water Dist. v. Superior Court*, 124 Cal. App. 4th 1453, 1459 (2004).

13 Many documents and communications on the amended supplemental "Privilege Log"
14 involve third parties. The third parties identified on the various documents and communications
15 are representatives, consultants, personnel, or attorneys for (1) the New Hampshire Insurance
16 Department, (2) Trygg-Hansa AB, (3) Zurich Affiliates and/or (3) the Home Holdings Inc.

17 For example, Document No. 30 on the amended supplemental "Privilege Log" is a memo
18 from Roger Moak, REM General Counsel, to Alden Warner of Centre Insurance Company, a
19 Zurich affiliate. If REM is a separate and distinct entity from Zurich affiliates, it is unclear why
20 these third parties are essential to furthering REM's interest or have an interest in maintaining the
21 confidentiality of the documents. REM has not provided any clarification on its amended
22 supplemental "Privilege Log" or meet-and-confer correspondence.

23 In addition, Document No. 53 on the amended supplemental "Privilege Log" is
24 correspondence from Roger Moak, REM General Counsel, to Michael Averill and Ray Tatti,
25 Representative for and Consultant to the New Hampshire Insurance Department, respectively, and
26 copying Al Lawrence, Arthur Wilson, and Timothy Callahan of REM Finance. The New
27 Hampshire Insurance Department is a public agency with its primary purpose being to protect
28 policyholders and the public. Its role in furthering REM's interest or its interest in maintaining

1 REM's confidences is questionable at best.

2 Because Document Nos. 22, 30, 43-45, 48-49, 51, 53-54, 57-73, 83, 185, 205, 230, 244,
3 350, 414, 416, 421-426, 428, 442-443, 446-447, 450-451, 453, 457, 459, 464, 466-472, 474-475,
4 477, 479, 483, 488, 491, 493-494, 498, 501-502, 505-506, 512, 515-516, 522, 524-526, 529-531,
5 546-549, 552, 555, 557, 558, 568, 571, 582, 623, 639, 644-645, 737, and 740 were disclosed to
6 third parties with whom REM has not asserted a common interest, the attorney-client
7 communication and attorney work product claims are waived.

8 **E. REM's Attorney-Client Communication and Attorney Work Product Claims**
9 **Fail for Documents Not Involving the Provision of Legal Services.**

10 The attorney-client privilege and attorney work product doctrine are not available where
11 an attorney is performing *nonlegal* services. *Aetna Cas. & Sur. Co. v. Superior Court*, 153 Cal.
12 3d 467, 475-476 (1984). Yet, many document and communication descriptions on the amended
13 supplemental "Privilege Log" do not suggest the provision of legal services and are largely of a
14 financial nature.

15 Roger Moak (and possibly other REM attorneys) serves REM as both General Counsel
16 and in an executive capacity, and his authorship or receipt of documents and communications
17 does not necessarily indicate the provision of legal services nor implicate the attorney-client
18 privilege and/or attorney work product doctrine. The attorney-client privilege does not apply
19 when an attorney merely "acts merely as a negotiator for the client or is providing business
20 advice." *Costco Wholesale Corp. v. Sup. Ct.*, 47 Cal. 4th 725, 735 (2009).

21 For example, Document Nos. 43-44 on the amended supplemental "Privilege Log" are
22 described as "Emails re Time Allocations" from Al Lawrence (REM VP, Finance) to Mike
23 Averill of the New Hampshire Insurance Department and copying Timothy Callhan (REM EVP,
24 Finance), Maria Cruce (REM AVP, Finance), and Roger Moak. Based on the document
25 descriptions, these documents do not appear to relate to Mr. Moak's role as General Counsel, but
26 rather merely in a business capacity.

27 Descriptions for Document Nos. 3-4, 13, 42-46, 48-56, 58-64, 66-76, 82-83, 89-90, 94,
28 98, 100-103, 105, 107, 112-121, 128-129, 133-134, 140, 179, 197-198, 310, 425, 442-443, 446-

1 447, 495, 501-502, 505-506, 515-516, 520-522, 524-526, 533, 543, and 639 do not suggest the
2 provision of legal services so as to warrant the applicability of the attorney-client communication
3 or work product privilege. REM should be compelled release these documents.

4 **F. REM's Amended Supplemental Privilege Log Lacks Sufficient Information to**
5 **Substantiate REM's Privilege Claims.**

6 As discussed above, the identification of individuals authoring and receiving documents
7 and communications is imperative for evaluating claims for the attorney client communications
8 privilege and work product doctrine. Yet, REM's amended supplemental "Privilege Log" fails
9 even to sufficiently identify individuals authoring and/or receiving certain documents.

10 First, the amended supplemental "Privilege Log" fails to provide the author and/or
11 recipient of certain documents. For example, the entry for Document No. 234 on the amended
12 supplemental "Privilege Log" fails to provide the date, author, and recipient of the document.
13 REM's attorney-client communication and attorney work product claims can not be verified.

14 Second, the accompanying identification chart fails to provide the title and company
15 affiliation for the author and/or recipient of certain documents. For example, Document No. 429
16 on the amended supplemental "Privilege Log" is correspondence from Martin Gross (REM
17 counsel) to Roger Moak (REM counsel) and copying Fred Potter. REM did not provide the title
18 and company affiliation for Fred Potter. REM's attorney-client communication and attorney
19 work product claims not be verified as it may have been waived by disclosure to a third party.

20 Given the lack of information, REM's good faith basis for its attorney-client privilege and
21 attorney work product claims for Document Nos. 29, 33, 167, 218, 223, 228, 230, 234, 236, 243-
22 244, 246, 429, 435-436, 446-447, 489, 508-509, 517, 520-521, 532-535, 540-541, 543-544, 550-
23 553, 571, 573, 581, 608, 612-615, 623, 639, 644-645, 708, 715, 718, 720, 726, and 729-731 is
24 questionable. REM should be compelled to provide further information substantiating its
25 privilege claims or release these documents.

26 **G. REM's Time Period Objections Fail.**

27 REM unilaterally limited the time period for its document production to a period from
28 June 12, 1995 to June 11, 2003, which is improper in light of discovery rulings already rendered

1 in this action. Specifically, the Discovery Referee has compelled Defendants in the above-
2 entitled actions to provide discovery regarding services by REM from 1995 to when REM ceased
3 being a Zurich subsidiary, i.e., 2007. Marder Decl. at ¶ 30, Exh. 28 (Motion to Compel 105).
4 Accordingly, Plaintiffs are entitled to REM's documents for periods from at least as early as 1995
5 to 2007, and REM's artificial time limitation is inappropriate. REM should be compelled to
6 produce all documents withheld based on its unilateral time limitation, including Document Nos.
7 12-13 and 219 on the amended supplemental "Privilege Log."

8 **H. REM's "Claims Related" Objections are Vague and Ambiguous.**

9 REM inadvertently included certain documents on its amended supplement "Privilege
10 Log" that are not in fact privileged. REM, however, contends these documents are "claims
11 related" and therefore not related to the Phase I Trial. Despite Plaintiffs' request for clarification
12 on this objection, Plaintiffs have not provided any further information. Because the document
13 descriptions for Document Nos. 5-6, 11, 31, 235, 417-419, 445, 448, 455-456, 476, 478, 480, 482,
14 486, 499-500, and 527 are not substantive or detailed, it is difficult, if not impossible, to evaluate
15 the validity of REM's objection as to producing these documents. REM should be compelled to
16 provide further information substantiating its objection or release these documents.

17 **I. REM Should be Compelled to Produce a Witness for Further Deposition**
18 **Testimony.**

19 REM should be compelled to produce a PMQ witness to address matters that, because of
20 REM's own conduct, were not covered and could not be covered during the initial PMQ
21 deposition. Since REM's PMQ deposition on December 10, 2010, REM has released many
22 improperly withheld documents from its privilege log.¹⁶ REM should be compelled to produce a
23 PMQ witness to provide further testimony as to these documents, which discuss Zurich American
24 Insurance Company's guarantee of REM leases, payments to or expenses for the Home,
25 outsourcing of the Home's operations to Zurich Technology Services. These documents relate to

26 _____
27 ¹⁶ REM has released documents from its privilege log numerous times. The continuous release of
28 documents after Plaintiffs raise concerns regarding REM's privilege claims demonstrates REM's
improper withholding of documents.

1 asset determination and the transfer thereof. Moreover, to the extent documents are released
2 pursuant to this Motion to Compel, REM should produce a PMQ witness to provide further
3 testimony as to these documents. In fact, REM's PMQ deposition concluded subject to resolution
4 of disputes regarding REM's privilege logs. Marder Decl. at ¶ 23, Exh. 21 at 357:20-359:2. Any
5 new documents produced off the privilege logs provide a reason to re-open the deposition.

6 Furthermore, during the deposition, REM instructed its PMQ witness, Mr. Joel M. Ross,
7 not to testify as the *amount of time* spent in preparing for deposition with counsel. Marder Decl.
8 at ¶ 23, Exh. 21 at 22:17-23:15, 24:16-25:3. REM asserts this information is protected by the
9 attorney work product doctrine. Only *writings* containing an attorney's impressions, conclusions,
10 and opinions, however, are absolutely protected under the attorney work product doctrine. *See*
11 Cal. Civ. Proc. Code § 2018.030. In turn, the qualified protection for "other work product"
12 extends to information that reflects an attorney's evaluation or interpretation of the laws or facts.
13 Cal. Prac. Guide Civ. Proc. Before Trial Ch. 8C-4 § 8:235. Plaintiffs, however, only seek the
14 amount of time counsel spent preparing with the PMQ witness, which reflects the credibility and
15 preparedness of the witness. Moreover, it reflects REM's ability to prepare for deposition, while
16 it claims to have no witnesses or documents to prepare as to certain topics. REM should be
17 compelled to provide a response to this deposition question.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request their Motion to Compel be
20 granted in its entirety and that REM release improperly withheld documents from its privilege
21 logs and produce a witness to provide further deposition testimony within twenty (20) days of the
22 Court's Order.

23
24 Dated: February 11, 2010

MORGAN, LEWIS & BOCKIUS LLP

25
26 By 
Elham Marder

27 Attorney for Plaintiffs