COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT
HAMPDEN, SS Civil Action No. 05-602

THE ROMAN CATHOLIC BISHOP OF SPRINGFIELD, a corporation sole,
Plaintiff

v.

TRAVELERS PROPERTY CASUALTY COMPANY,

MASSACHUSETTS INSURERS INSOLVENCY FUND,

NORTH STAR REINSURANCE CORPORATION,

UNDERWRITERS AT LLOYD'S, LONDON,

CENTENNIAL INSURANCE COMPANY,

INTERSTATE FIRE & CASUALTY COMPANY, and

COLONIAL PENN INSURANCE COMPANY,
Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

The principal claim asserted in this action is a request for a declaratory judgment regarding the rights and obligations of the parties with respect to various insurance policies issued by the Defendants, or their "predecessors," to the Plaintiff for the period January 1, 1968 through October 17, 1986. Defendants' propounded 47 interrogatories (not counting sub-parts) and requested the production of 76 categories of documents. Plaintiff served answers to the interrogatories and over 60,000 pages of material in response, along with related privilege logs. Defendants contend that Plaintiff's response is insufficient and they have served a Motion to

Compel further discovery from Plaintiff. The Plaintiff, the Roman Catholic Bishop of Springfield, a corporation sole, by its attorneys, submits this Opposition to Defendants' Motion to Compel Discovery in the above-captioned action.

INFORMATION AND MATERIAL UNRELATED TO THE EXHIBIT A OR B CLAIMS.

At the time the Complaint was filed in this action, there were 108 claims as to which Plaintiff sought a declaration concerning the coverage obligations owed by Defendants; some of these claims had been settled and some were still pending. In each case the claimant alleged that he or she was sexually abused or molested by a person, usually a priest, who was said to be subject to the supervision and control of the Plaintiff. These claimants were listed on documents that were provided to the court and marked as Exhibit A and Exhibit B. Some of the Exhibit A and B claimants alleged that they were abused by a single individual; the others alleged that they were abused by multiple individuals. Some of the alleged abusers were named by only a single claimant; the others were named by multiple claimants. In all, there were approximately 60 individuals identified as alleged abusers by the Exhibit A and B claimants.

In its responses to Defendants' discovery requests, Plaintiff provided material, subject to particular claims of privilege, for all claims by any claimant named in Exhibit A or B and for all claims against any alleged abuser named by and Exhibit A or B claimant, even if that claim was not one of those listed on Exhibit A or B.

Among other things, Defendants complain that Plaintiff did not provide material relating to the 17 claims of abuse made against Richard Lavigne, a former priest of the Diocese of Springfield, which were settled in 1994 with the participation of Defendants or their "predecessors." In fact, however, Plaintiff did produce this material and other material relating to claims involving Richard Lavigne or other abusers identified by the Exhibit A and B claimants. The material not produced by Plaintiff is material relating to claims by a person other than an Exhibit A and B claimant who alleges that he or she was abused by someone other than an alleged abuser named by an Exhibit A or B claimant. (For convenience, Plaintiff refers hereafter to these claims as "Other Claims.") If either the claimant or the alleged abuser was a person named in an Exhibit A or B claim, then Plaintiff produced the requested material, subject to Plaintiff's other objections based on privilege or lack of relevance. With regard to the Other Claims, Plaintiff refused to produce the material on the grounds that it was not relevant to the issues raised in this action.

Defendants argue that all abuse claims are relevant because the information may lead to admissible evidence concerning Plaintiff's "pattern and practice of handling Abuse Claims" or evidence applicable to their asserted defenses that the Exhibit A and B claims constitute "expected" or "intended" injuries, or that the "known loss" doctrine would apply to bar coverage for the A or B claims, or that the Plaintiff made misrepresentations concerning its knowledge of the occurrence of sexual abuse when it applied for the policies issued by Defendants or their "predecessors." Defendants arguments go too far. As Defendants point out, the scope of permissible discovery is broader than what is admissible at trial and extends to material that "appears reasonably calculated to lead to the discovery of admissible evidence." Mass. Rule of

Civil Procedure 26(b)(1). However, the discovery which Defendants seek to compel is not reasonably calculated to lead to such evidence.

Defendants' argument that they are entitled to discovery concerning Other Claims because the information may lead to admissible evidence concerning Plaintiff's "pattern and practice of handling Abuse Claims" which would be relevant to an evaluation of Plaintiff's liability generally has no support. The necessarily implied argument by Defendants is that discovery will show that Plaintiff had a pattern or practice of ignoring actual knowldge that its priests were sexually abusing minors and therefore encouraged other priests (including the abusers of the Exhibit A and B claimants) to commit such acts. This is an outrageous claim which is pure speculation and there is no rational basis for the argument. If such conduct was so widespread or regular as to constitute a pattern or practice, one would expect evidence of it to be seen in the produced material relating to the approximately 60 abusers named by the Exhibit A and B claimants. No such evidence is seen in the produced material and Defendants cite nothing to suggest that this evidence exists. Permitting discovery on the basis of such pure speculation in the absence of any supporting evidence would undermine any practical limit on discovery in every case. Clearly, the discovery requested has not been shown to be reasonably calculated to lead to admissible evidence. Litigants may be denied an opportunity for discovery where they have not made a minimal showing warranting the requested discovery. E.A.Miller, Inc. v. South Shore Bank, 405 Mass.95 (1989). Moreover, in ruling on discovery requests, a judge may take into account considerations of efficiency and economy. In the Matter of Roche, 381 Mass. 624 (1980). The court should reject Defendants request that it order Plaintiff to produce this material.

Defendants suggestion that the material regarding other claims may lead to evidence supporting their asserted defenses is also without any firm basis.

The argument that it might produce evidence that Plaintiff made misrepresentations in its applications for the insurance issued by Defendants rests on the same speculation as discussed above. Moreover, it assumes that questions concerning Plaintiff's knowledge of acts of abuse by its priests were asked in an application. Plaintiff has produced the material in its possession concerning its insurance policies. It has no such application material. More importantly, Defendants have not produced any such forms in connection with their Motion to Compel nor have they even specifically argued that such forms exist and that such questions were asked. At the time the 17 Lavigne claims were settled in 1994, the insurers had raised this misrepresentation argument. No evidence that such applications questions had been asked was produced then. In the absence of such application questions, there is no basis for a misrepresentation argument. Again, the requested discovery is not reasonably calculated to lead to admissible evidence on this subject.

The argument that evidence of the Other Claims might show the Exhibit A and B claimants' damages to be expected or intended also lacks rationality. In order to recover on a negligent supervision claim, the underlying claimants must show that the Plaintiff knew or should have known that the alleged abuser was committing abuse and failed to take action to prevent this. What the Plaintiff knew about abuse committed by some other person has no bearing on this issue. Moreover, for the expected or intended injury exclusion to apply, Defendant must show that Plaintiff acted or failed to act with the specific intent of causing the

resulting harm to the claimant or that Plaintiff was substantially certain that such harm would occur. See Quincy Mutual v. Abernathy, 393 Mass. 81 (1984). What the Plaintiff knew about abuse committed by some other person to some other claimant has no bearing on this issue, either.

Similarly, with regard to the "known loss" doctrine, in order to bar coverage for a particular underlying claim, Defendants must shown that Plaintiff had actual subjective knowledge that the damages in the underlying claim were occurring at the time the policy took effect or that the loss complained of was highly likely to occur. SCA Services v. Transp. Ins. Co., 419 Mass. 528, 532-33 (1995). Again, what Plaintiff knew about some other claim has no bearing on this issue. The requested discovery of Other Claims is not reasonably calculated to lead to admissible evidence regarding Defendants' known loss or other arguments.

ATTORNEY CLIENT PRIVILEGE MATERIAL

Defendants contend that Plaintiff's contractual duty to cooperate with its insurers in the investigation of claims requires the Diocese to disclose to them materials otherwise protected by the attorney-client privilege. Defendants' argument fails to distinguish the insurer's right to obtain information concerning the claims against the insured, which the duty to cooperate secures, from the insurer's right to obtain that information in the form of confidential attorney-client communications. Much has been written about the complex relationship between an insurer, its insured and counsel for an insured. What makes that relationship complex is that counsel has separate obligations to the insurer and the insured. The main purpose of the duty to cooperate is to avoid collusion and permit the insurer to make a proper investigation. Russ and

Segalla, Couch on Insurance 3d §194:4 (1999). However, it does not supersede the attorney client privilege and the work product doctrine, even where the cooperation clause is broadly worded. Id at §199:9. This is particularly true where there is a coverage dispute between the insurer and the insured. Id. Even though the insurers may not discover attorney-client materials, they are not precluded from discovering information pertinent to the claims.

SPIRITUAL COUNSELING MATERIAL

Defendants also seek an order from the court requiring Plaintiff to produce the material which it objected to producing on the basis of the spiritual counseling privilege. Mass. G.L. ch. 233, s.10A. Defendants argue that much of the withheld material does not appear to be "confessional." However, the privilege is not limited to statements made in the course of a person-to-person confession. Although such statements may be at the heart of the statutory protection, it extends to all acts by which ideas may be transmitted from one individual to another. Com. v. Zezima, 365 Mass. 238 (1974). (Individual's showing of a gun to a minister could be within the protection of the statute.). Even documents which are provided to a priest by a penitent are within the scope of the privilege. Ryan v. Ryan, 419 Mass. 86 (1994). The language of the statute makes it clear that the protection extends not only to the communication from the individual seeking counseling to the cleric, but also, to the advice given. Accordingly, Plaintiff contends that the discovery objections asserted by it on the basis of the spiritual counseling privilege are valid and should be upheld by the Court.

PSYCHOTHERAPIST AND SOCIAL WORKER - PATIENT PRIVILEGE

Plaintiff recognizes that it is not the patient with respect to the psychotherapist or social

worker records at issue. However, it contends that its relationship with its priests is different than that of an ordinary employer. Priests are not ordinary employees. They are consecrated to the priesthood on a lifetime basis, absent the extraordinary step of laicization. The priests take vows in connection with their ordination. The relationship between the Bishop and the priests is a sacred one. To argue that the Diocese was merely obtaining evaluations for purpose of determining whether to continue to employ a particular priest misstates the nature of the relationship. As noted in Plaintiff's Answers to Interrogatories, such material is not placed in the priests ordinary file, but instead, it is placed in a confidential file for which access is strictly limited to the Bishop and his designees. In these circumstances, Plaintiff contends that the transmission of such reports to the Diocese does not nullify its confidential nature. At a minimum, the Diocese should not be ordered to release such information until an opportunity is afforded to the individual priests to assert their confidentiality and privacy rights.

As the Court is aware, the Supreme Judicial Court's recent decision in Society of Jesus of New England v. Commonwealth and Talbot, decided May 13, 2004, did not resolve the issue of whether psychotherapy records provided to religious order for mandatory treatment of a priest within that order are subject to the psychotherapist-patient privilege under G.L. c. 233, §20B. At Footnote 13, the Court did state that the priests "interest in confidentiality at his communications with psychotherapists is one that would protected by statute. G.L. c. 233, §20B." The SJC noted that the judge below had held, "That the privilege had been waived by Talbot's own assent to sharing the records with his Jesuit superiors and that the privilege does not apply when diagnosis and treatment have been sought at the behest of an "employer" for purposes of "making employment decisions." But the SJC in Society of Jesus of New England did not decide the issue of "waiver" of the psychotherapist-patient privilege because the issue was not part of the

reported question. See Footnote 13. As to whether a waiver occurs when a priest submits to psychotherapy as a condition of retaining his priesthood is a matter yet to be determined by Supreme Judicial Court. Accordingly, in the circumstances of this case, Plaintiff contends that Defendants request for an order that Plaintiff produce these records should be denied.

FIRST AMENDMENT - RELIGIOUS AUTONOMY PRIVILEGE

The Roman Catholic Bishop of Springfield, a corporation sole ("RCBS"), was established by Chapter 368 of the Acts of 1898. The Act designates the Roman Catholic Bishop of the Diocese of Springfield as a "body politic" and a "corporation sole." The Roman Catholic Diocese of Springfield is a "purely ecclesiastical entity of the Roman Catholic church, having no separate legal existence, and exists to minister to the members of the Catholic faith" and preach the gospel of Jesus Christ "within its geographic jurisdiction." Wheeler v. Roman Catholic Archdiocese of Boston, 378 Mass. 58, 59 (1979). The RCBS is part of the Roman Catholic Church, "an episcopal church which is hierarchical in nature. It shares an identical faith and doctrine with other Catholic churches throughout the world and all these churches look to the Pope in Rome as their ultimate earthly authority." Id. at 60. The Roman Catholic Bishop of Springfield administers the Diocese with the advice and assistance of various Boards and Tribunals all of which are subject to the internal law of the Church (Canon Law). See id. at 60.

The Supreme Judicial Court of this Commonwealth has consistently recognized the special constitutional protections afforded to religion in both the Federal Constitution and the Constitution of the Commonwealth. In fact, the Supreme Judicial Court in 1994 held that the Declaration of Rights of the Constitution of the Commonwealth afforded an even higher degree

of protection to religion than that provided by the Federal Constitution. The Supreme Judicial Court has characterized religious rights as enjoying a "preferred position . . . in the pantheon of constitutional rights." Madsen v. Erwin, 395 Mass. 715, 724 (1985) (citing Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)); see also Fortin v. Roman Catholic Bishop of Worcester, 416 Mass. 781, 785 (1994) (noting that Massachusetts courts have no jurisdiction to consider claims concerning church property ownership even under the doctrine set forth in Jones v. Wolf, 443 U.S. 595, 602 (1979), because the Massachusetts Constitution provides even more protection to hierarchical churches than the U. S. Constitution).

The Massachusetts Supreme Judicial Court has recently issued two significant decisions which preclude civil courts from intervening in matters of church doctrine, discipline, faith and internal organization. In Williams v. Episcopal Diocese of Mass., 436 Mass. 574 (2002), an Episcopal priest brought an action against the Episcopal Diocese of Massachusetts and the presiding Bishop of the Diocese, Right Reverend M. Thomas Shaw. The suit alleged employment discrimination based on gender, in violation of G.L. c. 151B §4 (1) and (4). See id. at 575. The Defendants filed a Motion to Dismiss based upon the basis that the First Amendment to the United States Constitution precluded the Superior Court from exercising subject matter jurisdiction over the case. See id. The Court allowed the Motion to Dismiss and the Plaintiff filed for direct appellate review with the Massachusetts Supreme Judicial Court. See id. The application for direct appellate review was allowed by the Supreme Judicial Court. See id.

In its decision in Williams affirming the ruling of the Superior Court, the Court held that the First Amendment "precludes jurisdiction of civil courts over church disputes touching on matters of doctrine, canon law, polity, discipline, and ministerial relationships." Id. at 579. The

Supreme Judicial Court quoted the United States Court of Appeals for the Fifth Circuit, stating that "[t]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." Id. at 578 (quoting McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972). (Emphasis added) According to the Supreme Judicial Court, the ministerial relationship includes the functions of assigning and selecting a minister. Id. In the companion case of Hiles v. Episcopal Diocese of Mass., 437 Mass. 505, 506 (2002), an Episcopal Priest and his wife brought an action against the Episcopal Diocese alleging, among other things, negligence, intentional infliction of emotional distress and loss of consortium arising out of the Diocese's discipline of the priest as a result of allegations of sexual misconduct. In its decision affirming that the court lacked subject matter jurisdiction to adjudicate the claim, the Supreme Judicial Court held that "[t]he assessment of an individual's fitness to serve as a priest is a particular ecclesiastical matter entitled to . . . constitutional protection." Id. at 510. (Emphasis added) The Supreme Judicial Court further held that "[o]nce a court is called on to probe into a religious organization's discipline of its clergy, the First Amendment is implicated. When that occurs, principles of church autonomy deprive the court of subject matter jurisdiction." Id. at 511 (citations omitted). The allegations as set forth "would [have] require[d] the court to interpret canon law, apply church policies, assess [Hiles's] fitness and reputation as a priest, and review decisions of the Bishop." Id. at 575. As the Court ruled, however, "[t]hese are matters that are undoubtedly ecclesiastical, and therefore must be left to the Church to decide through its own disciplinary procedures." Id. (Emphasis added)

Therefore, it is well-established in this Commonwealth that the Courts are precluded from

reviewing matters of church doctrine, discipline, faith and internal organization. Thus, it follows that the discovery of documents and information of the RCB which pertain to matters of church doctrine, discipline, faith, and internal organization is precluded by the First Amendment of the United States Constitution. The discovery of documents and information protected from disclosure by the First Amendment poses a substantial danger of a chilling effort upon religious decision-making. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 496 (1979); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F. 2d 1164, 1171 (4th Cir. 1985); see also Ryan v. Ryan, 419 Mass. 86 (1994) (holding that, in a will contest, children of decedent may not discover tribunal records). The Plaintiff contends that this church autonomy doctrine protects various internal church operations and documents from discovery in this case, particularly with regard to its records concerning laicization of priests and material provided to the Vatican pursuant to the Apostolic Letter, Safeguarding the Sanctity of the Sacraments (*Sacramentorum Sanctitatis Tutela*).

Defendants argue that they do not seek to challenge Plaintiff's decision concerning laicization or its compliance with the dictates of the Apostolic Letter or to question the applicable principals of canon law, but, the only relevance of these materials, as opposed to the information that may be contained in them concerning what Plaintiff knew and when it knew things, is to permit a lay fact-finder to draw inferences concerning Plaintiff's knowledge based on the layperson's interpretation of the meaning and significance of information presented for the purpose of disciplining or terminating the role of some priests in the Diocese. This is precisely the kind of decision-making that the autonomy doctrine and its related constitutional guarantees preserves for the church. Plaintiff recognizes that in the Society of Jesus of New England v. Commonwealth case, 441 Mass. 662 (2004), the SJC upheld the enforcement of a subpoena to

obtain priest's personnel file in connection with a criminal prosecution for sexual abuse over a claim of religious autonomy. However, Plaintiff contends that the weight of the asserted interests in the present case are distinguishable and mandate a different result.

In this case, priest personnel files have been produced. The privilege is claimed only for the narrow category of material specifically included as part of the laicization petition and the identification of particular materials produced in accordance with the directives of the Safeguarding the Sanctity of the Sacraments directive. This material lies at the heart of Plaintiff's ecclesiastical operations involving the disciplining of its priests. Moreover, the interest in discovery of the materials for purposes of a civil action is also less significant than the interest of the Commonwealth in the enforcement of its criminal laws that was at issue in the Society of Jesus case. Accordingly, Plaintiff contends that the Court should deny Defendants requests for these particular materials.

OTHER MATTERS

With respect to the documents pertaining to the Colonial Penn coverage, Plaintiff does not object to producing that material. Plaintiff had no insurers during the period from 1968 through October 17, 1986 other than Defendants in this case. To the best of its knowledge, Plaintiff had no liability insurance coverage prior to 1968. To the extent it had coverage after October 17, 1986, that coverage is not at issue in this case. All such policies applicable to any of the claims listed on Exhibits A and B included a sexual molestation exclusion. To the extent Defendants argue that statements made by Plaintiff in connection with applications for those policies may provide evidence of what Plaintiff knew when it applied for Defendants' policies is purely speculative. Moreover as argued above there is no basis to believe any relevant

application questions were asked in connection with the issuance of Defendants' policies. Accordingly, Plaintiff should not be required to produce material concerning the post October 17, 1986 policies.

Defendants also object with respect to Plaintiffs answers concerning "destroyed documents." Plaintiff has provided the information it has and can not provide information about documents it can not identify.

Finally, with respect to not providing dates for certain documents, these relate to documents concerning "Other Claims" which, as argued above, are not relevant to the issues raised in this case and their discovery is not reasonably calculated to lead to admissible evidence.

THE PLAINTIFF, THE ROMAN CATHOLIC BISHOP OF SPRINGFIELD, A CORPORATION SOLE, by its attorneys:

Oct. 2, 2006.

John J. Egan, BBO # 151680
Kevin D. Withers, BBO # 531660
EGAN, FLANAGAN & COHEN, P.C.
67 Market St., P.O.Box 9035
Springfield MA 01102-9035
TEL: 413. 737-0260
FAX: 413. 737-0121

0417-050616\121660.wpd