COMMONWEALTH OF MASSACHUSETTS

Hampden Superior Court Department

CIVIL ACTION NO. 05-602

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

MOTION TO STRIKE APPEARANCE OF NIXON, PEABODY, LLP ATTORNEYS AND PRECLUDE THEIR REPRESENTATION OF DEFENDANT MASSACHUSETTS INSURERS INSOLVENCY FUND IN THIS CASE

NOW COMES the Plaintiff, Roman Catholic Bishop of Springfield, a Corporation Sole, by its attorneys, and it moves that the appearance of attorneys from Nixon Peabody, LLP on behalf of Defendant Massachusetts Insurers Insolvency Fund (MIIF) be stricken and that they be precluded from representing MIIF or other defendants in this case on the grounds that such representation is barred by the rules pertaining to conflicts of interest as more fully described below.

This is a case in which the Plaintiff, Roman Catholic Bishop of Springfield, a Corporation Sole, seeks a declaration of the respective rights and obligations of it and its "insurers" in connection with numerous claims asserted against the Plaintiff alleging that the Claimant was sexually abused or sexually molested by certain priests or others said to be employed or controlled by the Plaintiff. The Roman Catholic Bishop of Springfield, a Corporation Sole, is the legal entity through which the religious entity known as the Roman

7/19/06 Denied. See Memo of Decision and Order dated 7/17/06. (Agostini, J)
Attest: Stephanie Roscoe, Asst Clerk 5/26/06

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Catholic Diocese of Springfield conducts its operations. The Roman Catholic Church proclaims and teaches its faith throughout the world. The Roman Catholic Diocese of Springfield is a geographic division within the Roman Catholic Church and covers the four western counties of Massachusetts.

The Roman Catholic Diocese of Springfield, like other Roman Catholic dioceses across the United States, is led by a bishop, currently the Most Reverend Timothy A. McDonnell, who, by virtue of his office, is also the principal of the Plaintiff, Roman Catholic Bishop of Springfield, a Corporation Sole.[1] The bishops of dioceses in the United States are all members of the United States Conference of Catholic Bishops ("USCCB"). The Bishop of Springfield, like other diocesan bishops across the country, has various advisors for religious and secular matters, including, a Diocesan Attorney with respect to legal matters. The Bishops of the United States approved the creation of the National Association of Diocesan Attorneys (hereinafter the "NADA") in 1965 as an organization devoted to the continuing legal education, sharing of information and pooling of resources by attorneys retained to represent Roman Catholic dioceses in the United States. Diocesan counsel for the Diocese of Springfield is a member of the NADA. Membership in the NADA is restricted to the attorney staff of the General Counsel of the United States Conference of Catholic Bishops and those attorneys who have been specifically engaged by a diocesan Bishop for the conduct of legal work of a diocese on a substantial and ongoing basis. Attorneys who represent dioceses only on a limited basis are not eligible for membership in the NADA. . At meetings of the organization, the members confidentially discuss the

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[1] The principal diocese in a region is an "archdiocese" and its leader is referred to as an "archbishop." For convenience, dioceses and archdioceses are jointly referred to herein as "dioceses" and bishops and archbishops are jointly referred to herein as "bishops."

common legal problems that are faced by their dioceses, including strategies to best meet and resolve these problems. Issues are also raised and discussed through the mechanism of e-mails which are sent to all members of the NADA (the "list serv discussions"). The members of the NADA are required to maintain the confidentiality of the matters discussed in meetings and list serv discussions. (See Affidavit of John J. Egan, the original of which was previously filed as Exhibit 3 to Plaintiff's Motion to Take Discovery from Nixon, Peabody, LLP and a copy of which is attached hereto as Exhibit 1.)

Among the common problems that have been regularly discussed at meetings of the NADA and by way of list serv discussions over the past several years have been the problems associated with the numerous claims being made against dioceses all across the country by claimants alleging that they were sexually abused or sexually molested while minors by priests or others said to be employed or controlled by the particular diocese. The NADA and its members have also regularly discussed at their meetings and through the list serv the problems the dioceses have faced with insurers who had issued liability policies to a diocese which were in effect at the time the alleged acts of abuse or molestation had occurred. Counsel for the Plaintiff, Roman Catholic Bishop of Springfield, has regularly attended these meetings and participated in the discussions regarding the problems raised by the abuse and molestation claims. (See Affidavit of John J. Egan, Exhibit 1 attached hereto.)

Attorneys Joseph Tanski and Robert Kirby from the firm of Nixon Peabody, LLP's Boston office have filed an Appearance as counsel for the Defendant Massachusetts Insurers Insolvency Fund (hereinafter sometimes referred to as "MIIF") in this case. According to its website, Nixon Peabody, LLP, is "one of the largest multi-practice law firms in the United States,

with offices in 15 cities and more than 600 attorneys collaborating across 15 major practice areas[2]."

A number of dioceses of the Roman Catholic Church in the United States have been represented by attorneys from Nixon Peabody, LLP since January 1, 1985. In particular, Nixon Peabody attorneys have represented the Dioceses of Albany NY, Boston MA, Brooklyn NY, Manchester, NH, Ogdensburg NY, Philadelphia PA, Rochester NY and Rockville Center, Long Island, NY. See Nixon Peabody, LLP's Response to Plaintiff's Interrogatory #1 (Exhibit 2 attached hereto). The firm has represented at least three of these Dioceses in connection with sexual abuse cases; Boston, Manchester and Rockville Center. See Nixon Peabody, LLP's Response to Plaintiff's Interrogatory #2. The answers indicate that Nixon Peabody continues to represent at least the Manchester and Rockville Center Dioceses since attorneys from the firm are presently members of the National Association of Diocesan Attorneys in connection with these Dioceses. See Nixon Peabody's Answer to Plaintiff's Interrogatory #5. Plaintiff contends that these undertakings by Nixon, Peabody's attorneys create conflicts of interest that preclude the firm's attorneys from representing the Defendant Massachusetts Insurers Insolvency Fund in this case.

The applicable standards of professional responsibility for the handling of conflicts of interest issues are found in the Massachusetts Rules of Professional Conduct. Different standards have evolved for conflicts arising out of simultaneous representation of clients with potentially adverse interests and for conflicts arising out of successive representation of clients with adverse

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[2] See, http://www.nixonpeabody.com/about the firm.asp.

interests. In the case of representation that is successive – that is when an attorney is engaged to represent the interests of a party that are adverse to a former client of the attorney or the attorney's firm – courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality. See Flatt v. Superior Court, 9 Cal. 4th, 275, 283, 36 Cal. Rptr. 2d. 537, 541 (1994). The standard for disqualification in those instances is whether there is a "substantial relationship" between the subjects of the former and current representation. See, Massachusetts Rules of Professional Conduct, Rule 1.9. However, when the potentially conflicting parties are simultaneously represented by the same attorney or firm, the primary value at stake is the attorney's duty and the client's legitimate expectation of loyalty rather than confidentiality. Flatt v. Superior Court, 9 Cal. 4th at 284, 36 Cal. Rptr. 2d at 542. Both of those duties are implicated in the present case.[3] Based on the information available to it, Plaintiff contends that the disqualification rule implicated in the present case would be Rule 1.7 prohibiting the simultaneous representation of adverse interests. However, to the extent Nixon Peabody no longer represents some of the identified dioceses, Plaintiff contends their attorneys are also precluded based on the provisions of Rule 1.9 regarding conflicts of interest involving former clients and the implications of Rule 1.6 regarding the duty the duty of confidentiality .

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[3] The existence of at least potentially conflicting interests is implicitly recognized by Nixon Peabody in its representation to the Court at the October 5, 2005 conference that it has erected a so called "ethical screen" within its firm between attorneys representing Catholic dioceses and the attorneys representing the Fund in this case. As discussed below, this device is neither sufficient nor appropriate in the circumstances of this case.

SIMULTANEOUS REPRESENTATION OF ADVERSE INTERESTS.

A lawyer owes various duties to a client which impacts the lawyer's ability to take or retain a case in various situations. Rule 3:07 of the Massachusetts Rules of Professional Conduct (MRPC) sets forth the Rules for Professional Conduct ("MRPC") that apply in the circumstances pertinent to this case. In particular, Rule 1.7 (a) of the MRPC provides that:

> (a) a lawyer shall not represent a client if the representation of the client would be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and (2) each client consents after consultation.

This Rule reflects the fact that loyalty to a client is an essential element to the attorney-client relationship and expresses the general proposition that the duty of loyalty prohibits the simultaneous representation of adverse interests. See Comments 1 and 3 to Rule 1.7.

As stated above, Nixon Peabody, LLP, currently represents at least the Diocese of Manchester, NH and the Diocese of Rockville Center, Long Island, NY. And it has represented these Dioceses with regard to sexual abuse and/or sexual molestation claims that have been asserted against the church. Neither of the individual attorneys from Nixon Peabody who have filed appearances on behalf of the Massachusetts Insurers Insolvency Fund in this case, Attorneys Joseph C. Tanski and Robert L. Kirby, Jr., were directly involved in the representation of those other dioceses, Massachusetts Rules of Professional Conduct would nevertheless disqualify them in this case.

Rule 1.10 of the MRPC provides that:

> (a) while lawyers are associated in the firm, none of them shall knowingly represent a client when anyone of them practicing alone would be

prohibited from doing so by Rule 1.7, 1.8 (c) or 1.9.

As noted above, Rule 1.7 is the rule prohibiting a lawyer from representing a client if the representation of the client would be directly adverse to another client. Rule 1.8 (c) relates to certain prohibited transaction between a lawyer and a client and does not appear to be pertinent to the present case. Rule 1.9 is the rule pertaining to conflicts of interest with regard to the representation of former clients. Thus, even though neither Attorney Tanski nor Attorney Kirby personally represented other Catholic dioceses, they should be barred from representing the Fund in this case due to the representation of various Catholic dioceses by other members of their firm, if the representation of the Fund against the Diocese of Springfield in this case is adverse to the interests of those other Catholic dioceses and those other Dioceses have not consented after appropriate consultation. The Plaintiff, Roman Catholic Bishop of Springfield, in this case, contends that Nixon Peabody's representation of the Fund in this case is adverse to the interests of the other Dioceses and that, to the best of Plaintiff's knowledge, the necessary consents have not been given.[4]

Representation of the Massachusetts Insurers Insolvency Fund in the present case is clearly adverse to the interests of those dioceses represented by Nixon Peabody with respect to sexual abuse matters in several different ways. In its Answer to the Complaint for Declaratory

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[4] Plaintiff requested permission from the court to obtain discovery with regard to the consent issue. However, the Court did not permit that inquiry. Since obtaining consent is a means whereby attorneys can nevertheless, in some circumstances, continue to represent clients despite the existence of a conflict, Plaintiff contends that burden should be on Nixon Peabody in this case to show it has obtained the necessary consents.

Judgment, the Fund's attorneys have asserted affirmative defenses including that the Plaintiffs failed to mitigate, minimize or avoid damages (Eleventh Affirmative Defense), that Plaintiff's claims are barred or limited by the "known loss" doctrine (Sixteenth Affirmative Defense), that Plaintiff's claims are barred or limited to the extent that the Plaintiff seeks defense with respect to third party claims which do not constitute "suits" for which there is a duty to defend (Eighteenth Affirmative Defense), that Plaintiff's claims are barred or limited to the extent that the Plaintiff seeks coverage for bodily injury or personal injuries not caused by an "occurrence" within the meaning of the underlying policy (Nineteenth Affirmative Defense), that Plaintiff's claims are barred or limited to the extent that the Plaintiff seeks coverage for costs and expenses that do not constitute "damages" within the meaning of the underlying policy (Twentieth Affirmative Defense), that Plaintiff's claims are barred or limited to the extent that the Plaintiff does not seek coverage for damages that it was "legally obligated to pay" within the meaning of the underlying policy (Twenty-first Affirmative Defense), and that Plaintiff's claims are barred or limited to the extent Plaintiff seeks coverage for occurrences that were not fortuitous (Twenty-third Affirmative Defense). Although the Answer makes reference to the underlying insurance policy issued to the Diocese, these defenses are not based on any language peculiar to the underlying policies. Instead, these are the same kinds of issues that would be expected to be raised against any diocese seeking coverage under its liability insurance policies, including those dioceses represented by other Nixon Peabody attorneys. It is thus clear that the positions being advocated by Nixon Peabody attorneys in the present case on behalf of Massachusetts Insurers Insolvency Fund are directly adverse to the interests of other dioceses since a decision unfavorable to the Diocese of Springfield would negatively effect the legal position of those

other dioceses in their efforts to obtain insurance coverage for the abuse claims asserted against them.

Plaintiff expects further that issues are likely to be raised by the Fund's attorneys in this case regarding the intrinsic values of the underlying claims in the litigation, whether the amounts previously paid by the Diocese of Springfield in connection with the settlement of some of those claims were reasonable, particular persons who hold various offices in a Catholic diocese are covered as executive officers or employees of diocesan corporations under the language that is commonly found in liability insurance policies and whether sexual abuse or sexual molestation constitute bodily injuries for purposes of obtaining coverage under general liability policies. The position's likely to be taken by the Nixon Peabody attorneys on behalf of the Fund in this case with respect to those issues are also clearly directly adverse to the interests of their other diocesan clients.

In addition to its representation of other dioceses, Nixon Peabody has also represented the Insolvency Fund's claims handling agent, Guarantee Fund Management Services ("GFMS"). See Nixon Peabody's Answer to Plaintiff's Interrogatories #9 and 13. This organization is the claims-handling agent for the Massachusetts Insurers Insolvency Fund with respect to the claims for coverage by the Plaintiff in connection with the policies issued to Plaintiff by a now-insolvent insurer, Home Indemnity Company. GFMS is an unincorporated association that provides management and claims supervisory services to its member associations and funds. Its member associations and funds include not only the Massachusetts Insurers Insolvency Fund but, also, the insolvency funds of New Hampshire, Connecticut, District of Columbia, Maine, Rhode Island,

Virginia and Vermont. See the GFMS web site, http://www.gfms.org. Plaintiff understands and believes it to be true that the Diocese of Manchester, NH, has claims pending against the insolvency fund in that state and that the Nixon Peabody attorneys who have represented the Manchester Diocese with respect to sexual abuse claims asserted against it are likely to be called to testify in support of that Diocese's claims against the New Hampshire fund. Nixon Peabody's position via-a-vis GFMS, the funds in Massachusetts and New Hampshire and the Dioceses of Springfield and Manchester further implicates and complicates the conflict of interest problem generated by its attempt to represent the Massachusetts Insurers Insolvency Fund against the Diocese of Springfield in this case.

The fact that the Plaintiff Diocese of Springfield operates through a different corporate entity than dioceses elsewhere in the United States does not shield Nixon Peabody from the conflict of interest rules pertaining to simultaneous representation of adverse interests. Attorneys have been precluded from representation in such circumstances not only where a named individual client or a corporate client is involved on different sides of an issue, but also where parties closely related to another client engage as adversaries in subsequent cases. These cases include situations involving a trade association and members of the association, Glueck v. Jonathan Logan, Inc., 512 F.Supp. 223 (S.D. NY) aff'd. 653 F.2nd 246 (2d. Cir. 1981), and situations where separate subsidiaries of a corporation are involved, Strategm Development Corp. v. Heron, Int'l., 756 F.Supp. 789 (S.D. NY, 1991).

There is no definitive case law in Massachusetts on this issue. However, in the case of McCourt Co., Inc. v. FPC Properties, Inc., 386 Mass. 145, 434 N.E.2d 1234 (1982), the Supreme

Judicial Court ruled under the predecessor to Rule 1.7 that a law firm would be barred from representing a Plaintiff against a parent corporation and its subsidiary where the firm also represented the parent corporation in several unrelated matters. In a somewhat different context of an "in-house" attorney representing the employer corporation and affiliates of the employer, the Massachusetts Bar Association's Committee on Professional ethics has adopted the "alter ego" theory so that where there was an identity of ownership of two legally distinct companies "we would as a matter of reality and practicality ignore ... the separate legal identities of the employer and the other corporation and consider them as one or at least consider each as the alter ego of the other." MBA Opinion No. 83-9 (1983). See also ABA Formal Opinion 390 (1955)(In determining whether there is a sufficient unity of interests to require an attorney to disregard separate but related corporate entities for conflict purposes, the attorney should evaluate whether corporate formalities are observed, the extent to which each entity has distinct and independent management and boards of directors, and whether, for legal purposes, one entity should be considered the alter ego of the other) . This approach is also consistent with Comment 8 to Massachusetts Rule 1.7 which suggests that concurrent representation of related corporations would not be possible without consent, except where the effect of the adverse representation would be insignificant. The relationship of the Roman Catholic Church and its separate dioceses, including the Plaintiff and the other dioceses represented by Nixon Peabody attorneys, is sufficiently analogous to the situation involving related corporations for the rule against representation of simultaneous adverse interests to apply here where the adverse effect is clearly not insignificant.

In the absence of a showing of consent, Plaintiff contends that there is a clear showing that Nixon Peabody is simultaneously representing conflicting interests given its representation of at least two Roman Catholic dioceses with respect to sexual abuse claims and its representation of the Massachusetts Insurers Insolvency Fund in this case in opposition to Plaintiff's claim for insurance coverage with respect to the sexual abuse claims raised against it.

SUCCESSIVE REPRESENTATION OF ADVERSE INTERESTS.

Even if Nixon Peabody no longer represented Catholic dioceses or if its present representation did not involve sexual abuse claims, the Plaintiff contends that the Nixon Peabody, LLP attorneys are precluded from representing the Insolvency Fund in this case given the rules forbidding successive representation of adverse interests.

Rule 1.6 (a) of the Massachusetts Rules of Professional Conduct provides that, with certain exceptions not applicable here, "a lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation." This rule states a fundamental principle in the client-lawyer relationship which obligates the lawyer to maintain confidentiality of information relating to the representation, even after the representation is concluded. The purpose for this principle is to encourage clients to communicate fully and frankly with their lawyer as to all matters. See Comment 4 to Rule 1.6. Further, the principle of confidentiality is given effect not only with regard to matters strictly within the attorney-client privilege (and the related work-product doctrine) but also for information gained in the professional relationship that the client has requested be held

confidential. See Comment 5 to Rule 1.6.

The concern is that when taking a case that is adverse to the interests of another client, the lawyer may intentionally or inadvertently violate the obligation to maintain client confidence. Rule 1.8(b) of the MRPC provides that

> A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client consents after consultation, except as Rule 1.6 or Rule 3.3 would permit or require.

Where the new representation would be adverse to the interests of a former client, the lawyer may not take the case if the new matter is substantially related to the matter in which the lawyer represented the former client. See MRPC Rule 1.9 and Adoption of Erica, 426 Mass. 55, 61, 686 N.E.2d 967 (1997). Rule 1.9 (a) states that:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Determining whether an attorney or a law firm should be disqualified from representing a particular client in a particular matter depends on the material facts. The central issue in these circumstances is whether confidential information was imparted to the attorney in connection with the first case that would be relevant to representation of the adverse party in the later case. Mailer v. Mailer, 390 Mass. 371, 374-375, 455 N.E.2d 1211 (1983) and Deloury v. Deloury, 22 Mass. App. Ct. 611, 614-615, 495 N.E.2d 888 (1986).

Courts have adopted various approaches to resolving these issues. Some courts have adopted the application of an irrebuttable presumption that confidences were provided in the first action and that absent the former client's consent, the attorneys must be precluded in the second case. See e.g. T.C. Theatre Corp. v. Warner Brothers Pictures, 113 F. Supp. 265 (S.D. NY, 1953). Other courts have indicated that the facts pertinent to the particular situation must be considered to determine whether disqualification is appropriate. See e.g. Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D. NY, 1973) aff'd 518 F.2d 751 (2d Cir., 1975). In the Silver case, the District Court presumed that a senior partner in a firm would know more about what was happening in the firm's cases than a junior associate and ruled that the persuasiveness and detail of the proof required would vary with the status of the lawyers in a large firm and their involvement in the former case. Id. 370 F. Supp. 587. Although not ruling on this particular issue, the SJC, in Adoption of Erica, supra., did favorably cite the Second Circuit's decision in the Silver case that there must be a factual showing that the matters are substantially related to warrant disqualification.

As set forth above, the interests of the various Catholic dioceses now or formerly represented by Nixon, Peabody's attorneys are adverse to the interests of the client represented by Nixon, Peabody attorneys in this case, MIIF, particularly those dioceses which are or were represented by Nixon, Peabody's attorneys with respect to sexual abuse claims. To the extent at least two Nixon, Peabody attorneys are members of the NADA, they have or had access to confidential information concerning the potential strategies and plans of various dioceses for dealing with the arguments raised by their insurers, the very same kind of arguments raised by

MIIF in the present case. Since concern with maintaining confidentiality is a key concern that lies behind the rules prohibiting representation of adverse interests, those rules are clearly implicated in the circumstances of this case. Moreover, the involvement of Nixon, Peabody attorneys in the NADA also directly affects the Plaintiff in this case. Given the magnitude of the claims underlying this action, Plaintiff will be hesitant to avail itself of the benefits provided by the NADA knowing that attorneys from the law firm representing one of its principal opponents in this case have access to that organization's information, notwithstanding any representation or assurance that the information available to some Nixon, Peabody attorneys will not be shared with the particular attorneys representing MIIF in this case.

THE USE OF AN ETHICAL SCREEN

Plaintiff understands that Nixon Peabody claims to have erected an ethical screen to prevent access to or sharing of confidential information by attorneys working on matters involving the Diocese of Springfield and the Insolvency Fund and the attorneys working on matters for other dioceses.

Courts have disagreed about the sufficiency of using such devices. In the case of Bays v. Theran, 418 Mass.685, 692-693, 639 N.E.2d 720 (1994), the Massachusetts' Supreme Judicial Court upheld the disqualification of a law firm where it was found that confidential information from the Plaintiff pertinent to the matter at issue had been disclosed to an attorney in the law firm representing Defendant before the firm had filed an appearance for the Defendant. The Court rejected the firm's argument that screening of the attorney who had received the information would be sufficient to satisfy the duty of confidentiality.

The current Rules of Professional Conduct were adopted subsequent to the Bays case. Rule 1.10(d) of the MRPC provides for the use of an ethical screen, but, this Rule only applies in cases where a firm represents a client in a case where a newly associated attorney or his previous firm had represented a client whose interests are materially adverse. Even in that circumstance, the use of an ethical screen is only allowed where the newly associated "personally disqualified lawyer" had no information protected by Rules 1.6 or 1.9 and had neither material involvement nor substantial material information relating to the other matter. By implication, the use of such a screen would not be an appropriate substitute for disqualification in a situation where the firm's own attorneys had both material information and substantial involvement in representing a client with adverse interests such as the other dioceses represented by Nixon Peabody attorneys here.

CONCLUSION

Attorneys Tanski and Kirby and any other lawyers from the firm of Nixon Peabody, LLP should be barred from representing the Massachusetts Insurers Insolvency Fund against the Plaintiff in this present case on the grounds of conflict of interest.

The Roman Catholic Bishop of Springfield, a corporation sole, by its attorneys:

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