IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARRY MCCRINK, SR., ET AL.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PEOPLES BENEFIT LIFE INSURANCE COMPANY	:	NO: 2:04-cv-01068-LDD
	:	

MEMORANDUM AND ORDER

Davis, J November 29, 2004

Presently before the Court are Plaintiffs' Motion to Strike Objections and to Compel Discovery Responses (Doc. No. 12), filed on September 1, 2004, and Defendant's Memorandum In Response to Plaintiffs' Motion (Doc. No. 15), filed on September 29, 2004. For the following reasons, this Court grants plaintiffs' motion in part and denies plaintiffs' motion in part.

I. Factual and Procedural History

This discovery dispute arises from a bad faith insurance claim filed by plaintiffs Garry McCrink, Sr. and Cheryl McCrink ("plaintiffs"), individually and as personal representatives of the estate of Gary McCrink, Jr., against defendant People's Benefit Life Insurance Company ("defendant").

On June 3, 2002, Garry McCrink, Jr. was struck and killed by a motor vehicle. (Compl. at ¶9). Gary McCrink, Jr. was a named insured under a group policy issued by defendant. (Id. at ¶5). The policy entitled him to an accidental death benefit of $100,000. (Id. at ¶7). Plaintiffs made demands for the payment of the benefit. (Id. at ¶10). By letters dated January 7, 2003 and December 8, 2003, defendant denied payment of the $100,000 benefit to plaintiffs. (Id. at ¶24).

Defendant denied payment on the basis of an exclusion in the policy related to the insured's "operation" of a motorcycle at the time of the accident.

On September 1, 2004, plaintiffs filed a motion to strike objections and to compel discovery responses and the production of documents. (Doc. No. 12). On September 29, 2004, defendant People's Benefit Life Insurance Company ("defendant") filed a response to the motion to compel, objecting to the requested discovery primarily on the grounds of relevance, the attorney-client privilege, and the work-product privilege. (Doc. No. 15). Defendant has provided a privilege log with its response. (See Privilege Log, attached as Exhibit A to Def. Rsp. To Pl. Mot. To Compel).

II. Discussion

Pursuant to the Federal Rules of Civil Procedure, a party is entitled to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Fed. R. Civ. P. 26(b)(1). The rule permits a broad range of discovery. See, e.g., Thompson, Jr. v. Glenmede Trust Co., 1993 WL 410283, at *1 (E.D. Pa. Sept. 10, 1993) ("The modern discovery rules mandate a liberality in the scope of discoverable material.").

The party resisting production bears the burden of persuasion. See Fidelity And Deposit Co. Of Maryland v. McCulloch, 168 F.R.D. 516, 520 (E.D. Pa. 1996). A party resisting discovery "must show specifically" how the information requested "is not relevant or how each question is overly broad, burdensome or oppressive." Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982). The party resisting discovery also bears the burden of demonstrating the applicability of an evidentiary privilege, such as the attorney-client privilege or the work-product

privilege, as a bar to discovery. See Schmidt, Long & Assoc., Inc., v. Aetna U.S. Healthcare, Inc., 2001 WL 605199, at *2 (E.D. Pa. May 31, 2001).

A. Defendant has not waived the attorney-client privilege or the work-product privilege.

Plaintiffs claim that the attorney-client and work-product privileges are inapplicable in insurance bad faith cases where the legal opinion of a party's counsel is "in question." (Pl. Mot. To Compel, at ¶¶37, 47). Plaintiffs' argument assumes that defendant waived these evidentiary privileges by placing the legal opinion of its counsel "in question." (Id.). This Court disagrees.

1. Attorney-Client Privilege

This Court looks to state law to determine the applicability of evidentiary privileges to discovery disputes in diversity actions. Fed. R. Evid. 501. Because this litigation is brought under Pennsylvania's bad faith statute, this Court applies Pennsylvania law with respect to the attorney-client privilege. See Montgomery County v. Microvote Corp., 175 F.3d 296, 301 (3d Cir. 1999).

Under Pennsylvania law, the attorney-client privilege is governed by statute. See 42 Pa. Cons. Stat. Ann. § 5928. This statute codifies the common-law attorney-client privilege, and requires the party resisting discovery to demonstrate: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is a member of the bar of a court, or his or her subordinate, and is acting as a lawyer in connection with the communication; (3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing primarily either an opinion of law, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by the client.

Saldi v. Paul Revere Life Ins. Co., 224 F.R.D. 169, 192 (E.D. Pa. 2004). The privilege bars discovery of confidential communications made by the client during the course of representation, although it does not apply to the "disclosure of the underlying facts by those who communicated with the attorney." See Upjohn Co. v. United States, 449 U.S. 383, 396-396 (1981) ("protection of the [attorney-client] privilege extends only to communications and not to facts"); George v. Wausau Ins. Co., 2000 WL 1728511, at *2 (E.D. Pa. Nov. 21, 2000); United States Fidelity & Guaranty Co. v. Barron Industries, Inc., 809 F.Supp. 355, 364 (M.D. Pa. 1992) ("The [attorney-client] privilege simply does not attach to a discussion of the facts, no matter how extensive or involved the discussion may become.). Client communications with both in-house and outside counsel are protected by the privilege. Robertson, 1999 WL 179754, at *5 (E.D. Pa. March 10, 1999).

The Third Circuit has declared that a waiver of the attorney-client privilege in the insurance liability context occurs under both federal common law and Pennsylvania law only when the party asserting the privilege takes the affirmative step of "put[ting] his or her attorney's advice in issue in the litigation." Rhone-Poulenc Rorer, Inc., 32 F.3d at 863.[1] An attorney's advice is not in issue "merely because it is relevant." Id. at 864. Nor is it in issue "because the attorney's advice might affect the client's state of mind in a relevant manner." Id. Instead, a party takes the affirmative step of placing the advice of counsel "in issue" when a client chooses to make the advice of counsel an essential element of a claim or defense and "attempts to prove that claim or defense by disclosing or describing an attorney client communication." Id.

[1]The Third Circuit noted that there were no "principles of rules of law as to the attorney client privilege unique to Pennsylvania that should control the resolution of our decision on these matters." Rhone-Poulenc Rorer, Inc., 32 F.3d at 862.

Most Pennsylvania courts addressing this issue have either implicitly or expressly applied the Third Circuit's standard for waiving the attorney-client privilege to bad-faith insurance actions brought pursuant to Pennsylvania's bad faith insurance statute. See, e.g., Robertson v. Allstate Ins. Co., 1999 WL 179754, at *3-5 (E.D. Pa. March 10, 1999) (denying motion to compel production of documents because defendant did not take affirmative step of placing advice of in-house counsel in issue); Dombach v. Allstate Ins. Co., 1998 WL 633655, at *1 (E.D. Pa. Aug. 27, 1998) (refusing to find that Pennsylvania bad faith statute created exception to attorney-client privilege, thereby denying motion to compel unredacted version of insurer's claim file); Quaciari v. Allstate Ins. Co., 1997 WL 570921, at *1 (E.D. Pa. Sept. 3, 1997) (attorney-client privielge applies to communications between insurance company and in-house counsel concerning claim that later becomes basis for bad faith lawsuit); General Refractories Co. v. Fireman's Fund Ins. Co., No. 3068, No. 3264-3268 EDA 2000 (Pa. Super. Ct. June 13, 2002) (memorandum opinion) (applying Rhone-Poulenc Rorer, Inc. and finding that bad faith allegations do not nullify the attorney-client privilege). These courts find waiver when the party claiming the benefit of the privilege takes the affirmative step of making the advice of counsel an integral part of a claim or defense. See, e.g., Fidelity, 168 F.R.D. at 520 (applying Rhone-Poulenc Rorer and finding that requested documents not discoverable because insurance company asserted no claim or defense that rests on advice of counsel); but see Jones v. Nationwide Ins. Co., 2000 WL 1231402, at *2 (M.D. Pa. July 20, 2000) (affirmative defense that insurer "acted reasonably" when investigating plaintiff's claim makes advice of counsel relevant for purposes of discovery because advice of counsel "inextricably interwoven into the fabric of the facts that occurred"). By preventing a naked allegation of bad faith from eviscerating the

attorney-client privilege, these courts preserve the attorney-client privilege, and the public and private interests that the attorney-client privilege serves, in the context of insurance litigation. See Robertson, 1999 WL 179754, at *5 ("Plaintiffs simple assertion of bad faith does not entitle him to circumvent the attorney-client privilege.").

Defendant has not taken the affirmative step of putting the advice of counsel in issue. Defendant has not pled the advice of counsel as an affirmative defense to rebut plaintiffs' allegation of bad faith. Nor has defendant asserted counterclaims that rely upon the advice of counsel. Accordingly, defendant has not waived the attorney-client privilege, and the requested documents and answers are not discoverable solely on the basis that the attorney-client privilege is inapplicable.

2. Work-Product Privilege

Federal Rule of Civil Procedure 26(b)(3) governs the applicability of the work-product privilege in a federal forum. See, e.g., United Coal Companies v. Powell Construction Co., 839 F.2d 958, 966 (3d Cir. 1988) (work product privilege in diversity cases controlled by Federal Rule of Civil Procedure 26(b)(3), rather than state law).[2] Rule 26(b)(3) protects "documents and

[2]The application of Federal Rule of Civil Procedure 26(b)(3), rather than the Pennsylvania work-product privilege, as codified in Rule 4003.3 of the Pennsylvania Rules of Civil Procedure, is significant. Compare Pa. R. Civ. P. 4003.3 (party may obtain discovery of relevant matter prepared in anticipation of litigation by or for another party, except for mental impressions of party's attorney or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories) with Fed. R. Civ. P. 26(b)(3). In addition to the vastly different scope of the two work-product privileges, Pennsylvania state courts have suggested that the work-product privilege of Rule 4003.3 is inapplicable where the legal opinion of an attorney is directly relevant to a cause of action, regardless of whether the insurer takes the affirmative step of placing this legal advice in issue in the litigation. See, e.g., Birth Center v. St. Paul Companies, Inc., 727 A.2d 1144, 1165 (Pa. Super. Ct. 1999) (stating in broad terms that "where the legal opinions, conclusions, memoranda, notes or summaries, legal research or legal theories become a relevant issue in a case, the law of Pennsylvania is that the party seeking discovery need not show substantial need and undue hardship to obtain discovery of such materials"); Nedrow v.

tangible things" prepared by a party or its representatives in anticipation of litigation on an objectively reasonable basis. See Robertson, 1999 WL 179754, at *2; see also Atiyeh v. Liberty Mutual Ins. Co., 2000 WL 1796420, at *1 (E.D. Pa. Nov. 15, 2000) (gauge for determining applicability of work-product privilege in bad faith insurance litigation is when "the probability of litigating the claim is substantial and imminent"). It also protects "disclosure of the mental impressions, conclusions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). The work-product privilege does not protect materials prepared in the regular course of business. Raso v. CMC Equipment Rental, Inc., 154 F.R.D. 126, 127-128 (E.D. Pa. 1994). Because the work-product privilege is not absolute, the party seeking discovery may overcome the privilege by showing "substantial need" and that the substantial equivalent of the material is unavailable through other sources. Fed. R. Civ. P. 26(b)(3).

Plaintiffs' "mere claim of bad faith is not enough to shatter this work-product privilege." Robertson, 1999 WL 179754, at *2; see also Provident Life & Acc. Ins. Co. v. Nissenbaum, 1998 WL 800323, at *1 (E.D. Pa. Nov. 17, 1998) (applying work-product privilege to bad faith claim); Garvey, 167 F.R.D. at 393-394 (applying work-product privilege to shield documents from discovery in bad faith claim). Indeed, to waive the work-product privilege, the client must assert that "the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the clients' conduct." In re Painted Aluminum Products Antitrust Litigation,

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Pennsylvania Nat'l Mutual Casualty Ins. Co., 31 Pa. D. & C. 3d 456, 459 (Somerset Cty. 1981). In contrast to plaintiffs' suggestions, these Pennsylvania decisions are irrelevant to this action because they rely upon Pennsylvania law, rather than upon the interpretation and application of Rule 26(b)(3).

1996 WL 397472, at *4 (E.D. Pa. 1996) (applying what is now § 92 of the Restatement (Third) of the Law Governing Lawyers). Like the standard for waiving the attorney-client privilege, this requires an affirmative step by the client, as opposed to an opposing litigant's bald assertion that such advice is relevant. See Fidelity, 168 F.R.D. at 521 (no waiver of work-product privilege because no affirmative step by defendant placing legal advice in issue). Consequently, for the same reasons that defendant has not waived the attorney-client privilege, defendant has not waived the work-product privilege.

3. Conclusion

Because defendant may assert both the work-product and attorney-client privilege, the Court must now evaluate the merits of defendant's individual objections to the interrogatories and document requests.

B. Interrogatories

1. Interrogatory 1

Plaintiffs argue that defendant should be compelled to answer Interrogatory 1.[3] Interrogatory 1 is a contention interrogatory. As such, defendant need not answer the contention interrogatory until the close of discovery. Fed. R. Civ. P. 33©) (contention interrogatory need not be answered "until after designated discovery has been completed or until a pre-trail conference or other later time"); see also B. Braun Medical Inc. v. Abbott Laboratories, 155 F.R.D. 525, 527 (E.D. Pa. 1994) (noting that "there is considerable support for deferring contention interrogatories until the end of the discovery period"). To force defendant to respond

[3]Interrogatory 1 aks: "Do you contend that the Plaintiffs or the deceased, were in breach or violation of any term or condition of the insurance policy which is the subject of the complaint."

at this stage in the litigation would require defendant to "articulate theories of [its] case not yet fully developed." Id. at 527. Consequently, plaintiffs' motion with respect to interrogatory 1 is denied.

2. Interrogatories 2, 13, 14, 15, 19, 20, 26, 27

Defendant has withheld answers to Interrogatories 2, 13, 14, 15, 19, 20, 26, and 27 on the basis of the attorney-client privilege and the work-product privilege. Defendant also asserts that these interrogatories are irrelevant.

Interrogatory 2 requests defendant to state with particularity the reasons that defendant relies upon "in this litigation" for denying plaintiffs' claim. Defendant shall be required to answer this interrogatory to the extent that it seeks the factual basis for the denial of plaintiffs' claim. See, e.g., Upjohn Co., 449 U.S. at 395 (facts underlying communication with attorney not protected from discovery on basis of attorney-client privilege). However, defendant shall not be required to answer this interrogatory to the extent that it calls for the defendant's legal reasoning and theories for denying plaintiffs' claim, rather than for the factual basis underlying this reasoning. Fed. R. Civ. P. 26(a)(3) (work-product privilege extends to "mental impressions, conclusions, opinions, or legal theories" concerning the litigation); see, e.g., In re Cednant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (mental impressions and legal theories afforded "near absolute protection" from discovery). Consequently, plaintiffs' motion to compel an answer to Interrogatory 2 is granted in part and denied in part.

Interrogatories 13, 19, and 26 ask whether plaintiff consulted with an attorney to obtain a legal opinion as to the meaning of the term "operating" within the motorcycle exclusion to the insurance policy at various times between June 3, 2002 and December 31, 2003. These

interrogatories do not seek the content of privileged communications between an attorney and client. See Wright, Miller, Marcus, Federal Practice and Procedure § 2017, at 268 (2nd ed. 1994) ("Information about existence of attorney-client relationship is ordinarily held not privileged."). Instead, these interrogatories only seek the fact of legal consultation, which is not protected by the attorney-client privilege. See Howell v. Jones, 516 F.2d 53, 58 (5th Cir. 1975) (noting that great weight of authority treats fact of consultation outside scope of attorney-client privilege); see also H.W. Carter & Sons, Inc. v. William Carter Co., 1995 WL 301351, at *3 (S.D. N.Y. May 16, 1995) (noting that "attorney-client privilege does not extend to facts pertaining to the existence of an attorney-client relationship, the fact of consultation, or the dates and general nature of legal services performed"). Nor is the fact of consultation protected by the work-product privilege. See Fed. R. Civ. P. 26(a)(3). Furthermore, interrogatories 13, 19, and 26 are relevant because they request information related to whether defendant failed to seek counsel's advice in interpreting the motorcycle exclusion.[4] Plaintiff's motion to compel is therefore granted with respect to interrogatories 13, 19, and 26.

[4] Although this Court finds that defendant has not waived the content of these communications, the fact of consultation with an attorney is still relevant to plaintiffs' bad faith claim. Indeed, part of plaintiffs' theory of bad faith is that defendant failed both to seek a legal opinion of the definition of "operation" in the motorcycle exclusion of the insurance policy and to research applicable case law interpreting the term "operation" prior to denying plaintiffs' claim. (Compl. at ¶30(h)-(k)); see 42 Pa. Cons. Stat. Ann. § 8371 (permitting punitive damages against insurer for acting in bad faith on insurance policy); see also Kosierowski v. Allstate Ins. Co., 51 F.Supp.2d 583, 594 (E.D. Pa. 1999) (recovery of bad faith under Pennsylvania's insurance statutes requires plaintiff to show by clear and convincing evidence that insurer did not have reasonable basis for denying coverage under policy and that insurer knew of or recklessly disregarded its lack of reasonable basis in denying claim). Accordingly, plaintiffs may seek discovery of all information related to defendant's seeking of, or failure to seek, legal advice on the interpretation of the motorcycle exclusion, so long as this information is not privileged.

Interrogatories 14, 20, and 27 seek identification of any legal decision, authority, or secondary source that defendant relied upon to determine the meaning of "operating" within the motorcycle exclusion of the insurance policy at various times between June 3, 2002 and December 31, 2003. These interrogatories do not seek privileged communications between an attorney and client. Nor do they ask defendant to identify its reasoning for interpreting the term "operation" in a particular way. Instead, they seek the factual source that defendant relied upon to interpret the policy. The incorporation of this factual source into communications between defendant's employees and in-house/outside counsel does not trigger the protection of the attorney-client privilege. See, e.g., Rhone-Poulenc Rorer, Inc., 32 F.3d 851, 864 (3d Cir. 1994) ("litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer"). Furthermore, these interrogatories are not subject to the work product doctrine because they do not seek to compel "documents and tangible things," nor do they seek the "mental impressions, conclusions, opinions, or legal theories" of an attorney.[5]

Interrogatory 15 requires the plaintiff to identify the source from which defendant received the legal authority identified in Interrogatory 14 and the date that defendant received this information. This interrogatory does not seek a privileged communication. Furthermore, Interrogatory 15 is not subject to the work-product privilege because it does not seek "documents

[5]This Court also notes that the information sought through Interrogatory 14 is not subject to the work-product privilege for another reason. Interrogatory 14 seeks information prior to the defendant's express denial of plaintiffs' claim by letter on January 7, 2003, and prior to plaintiffs' threat of litigation on July 29, 2003. Thus, the information requested through Interrogatory 14 was not prepared "in anticipation of litigation." Fed. R. Civ. P. 26(b)(3).

and tangible things" or the mental impressions and conclusions of an attorney. Fed. R. Civ. P. 26(b)(3).

3. Interrogatory 30

Interrogatory 30 requires information concerning defendant's previous denial of claims based upon the motorcycle exclusion, including the names of previous claimants, litigation information, and the names of the employees that handled and processed the claims. Defendant contends that Interrogatory 30 is overly broad and that, even if relevant, the burden of producing this information would outweigh the likelihood of finding relevant material. (Def. Mem. In Opp'n to Mot. To Compel, at 16).

Courts within the Third Circuit generally refuse to permit discovery of previous lawsuits filed against insurance companies concerning the disputed policy provisions at issue in the current bad faith litigation. Fidelity, 168 F.R.D. at 525 (refusing discovery of all lawsuits brought against insurer concerning disputed policy provisions). Following these rulings, this Court finds that the burden and expense of producing the information requested in Interrogatory 30, which seeks information regarding all bad faith cases concerning the motorcycle exclusion brought against defendant, outweighs the likelihood of finding relevant material. See, e.g., Kaufman v. Nationwide Mutual Ins. Co., 1997 WL 703175, at *2 (E.D. Pa. Nov. 12, 1997) (refusing to compel defendant to answer interrogatories concerning other bad faith cases). Information about previous litigation concerning the motorcycle exclusion can be obtained from Westlaw or Lexis. See, e.g., Cantor v. Equitable Life Assurance Society of United States, 1998 U.S. Dist. LEXIS 8435, at *11 (E.D. Pa. June 9, 1998) (refusing to compel insurer to identify all cases in which insurer requested physical or psychiatric examination for insureds who suffered disability for past five years because information available through Westlaw or Lexis).

Furthermore, most of this information is likely to be irrelevant, particularly because insurance litigation rests upon particular factual circumstances, which are likely to differ significantly from case to case. See Shellenberger v. Chubb Life America, 1996 WL 92092, at *3 (E.D. Pa. Feb. 29, 1996) (refusing discovery of similar suits regarding payment of "own occupation" disability benefits because existence of previous suits irrelevant for purposes of whether defendants acted in bad faith in denying plaintiff's claim). Consequently, plaintiffs' motion to compel an answer to Interrogatory 30 is denied.

C. Document Requests

1. Document Requests 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 22, 26, and 33

Defendant withholds documents responsive to these requests on the basis of the attorney-client privilege and the work-product privilege. (Def. Mem. In Opp'n To Pl. Mot. To Compel, at 7). Defendant's privilege log states that defendant is withholding the following ten documents: six documents authored by employees in the claims department to senior counsel concerning the applicability of the motorcycle exclusion claim; a memorandum authored by senior counsel to general counsel regarding the bad faith claim; one note to the file authored by a claim department employee concerning investigation of the claim; and two notes from senior counsel to claim department employees concerning investigation of the claim. (See Privilege Log). Plaintiffs request that this Court perform an *in camera* review of the documents to make sure that their contents are subject to an evidentiary privilege. (Id. at ¶47).

The party claiming the benefit of evidentiary privileges bears the burden of persuasion. Saldi, 224 F.R.D. at 194. Generally, the party asserting the privilege demonstrates the applicability of the privilege by submitting the documents in question, an affidavit by the

attorney, or a privilege log. Id. If a privilege log is submitted, it should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure." Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 471 (S.D.N.Y. 1993). A court must reject the claim when the party fails to provide a privilege log with sufficient detail to meet the legal requirements for application of the privilege. Id.

a. Documents Identified in the Privilege Log prepared After July 29, 2003.

Defendant provides a privilege log that identifies six documents[6] prepared after July 29, 2003, the date that defendant received a letter from plaintiffs' lawyer informing defendant that legal proceedings would be initiated if defendant persisted in the denial of plaintiffs' claim. (See July 29, 2003 letter, attached as Exhibit B to Def. Mem. In Opp'n to Pl. Mot.). These documents relate to the applicability of the motorcycle exclusion, the threatened bad faith claim, and the investigation of the claim. This Court agrees that after the plaintiffs threatened litigation through the July 29, 2003 letter, the insurance company's activities shifted from mere claims evaluation to defending against the prospect of litigation on an objectively reasonable basis. See, e.g., Robertson, 1999 WL 179754, at *4 (report prepared by employee of insurance company to lawyer containing litigation plan protected by work product privilege). Accordingly, the documents produced by defendant's employees and legal representatives after July 29, 2003 were generated in anticipation of litigation and fall within the work product privilege. See Garvey v. Nat'l Grange Mutual Ins. Co., 167 F.R.D. 391, 394 (E.D. Pa. 1996) (documents prepared after

[6]These documents are identified in the privilege log as PB-00068, PB-00069, PB-00070-73, PB-00109, PB-00121, and PB-00209.

July 1, 1993 in anticipation of litigation subject to work-product privilege in bad faith insurance case, although plaintiff's claim not denied by defendant until October 20, 1994).

Nor have plaintiffs met their burden of establishing both a substantial need for the materials in question and an inability to obtain substantially equivalent materials without undue hardship. Fed. R. Civ. P. 26(b)(3) (work product materials discoverable when party shows substantial need for materials and when party is unable without due hardship to obtain substantial equivalent of materials). Plaintiffs' general allegation of bad faith does not meet this two-prong standard, particularly when the plaintiffs have had the opportunity to depose the claims officials who handled the claim. See Garvey, 167 F.R.D. at 394 (no substantial need for documents upon mere allegation of bad faith and no undue hardship in obtaining substantial equivalent when plaintiff took deposition of defendant's agents who processed claim).

b. Documents Identified in the Privilege Log Prepared Before July 29, 2003

The privilege log also identifies four documents that pre-date July 29, 2003.[7] Defendant withholds these documents on the basis of the attorney-client privilege, rather than the work-product privilege. To facilitate a determination of the attorney-client privilege, a court may require "an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps." See United States v. Constr. Products Research, Inc., 73 F.3d 464, 473 (2nd Cir. 1996). It is impossible to tell from a review of the privilege log whether the documents withheld by defendant were properly withheld in their entirety on the basis of the attorney-client

[7]These documents are identified in the privilege log as PB-00051, PB-00052, PB-00054, and PB-00063.

privilege. Consequently, defendant shall be required to submit the documents marked PB-00051, PB–00052, PB-00054, and PB-00063 within ten days of this order for *in camera* review.

c. All other documents responsive to document requests 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 22, 26, and 33.

Defendant has not identified any other documents that are responsive to document requests 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 22, 26, and 33 and that are being withheld on the basis of an evidentiary privilege. To the extent that defendant possesses such documents, defendant shall submit these documents to the Court within ten days of this order for *in camera* review. Furthermore, all documents in defendant's possession that are responsive to these documents requests, but that are not privileged, shall be immediately produced to plaintiffs.

2. Document Requests 16, 17, 18, and 30

Document Requests 16, 17, 18, and 30 seek claims and procedural manuals, training manuals, materials related to the investigation of insurance claims, and materials related to defendant's efforts to comply with the Unfair Insurance Practices Act. Defendant objects on the ground that the requests are overly broad. (Def. Mem. In Opp'n to Pl. Mot. to Compel, at 12-15).

This Court agrees with the defendant that the requests for entire claims and training manuals, investigation materials, and compliance manuals are overly broad and burdensome. However, it is well-settled that manuals and other training materials are relevant in bad faith insurance litigation where they contain instructions concerning procedures used by employees in processing claims. See Shellenberger, 1996 WL 92092, at *2 (copies of definition section in insurance company's manuals relevant to bad faith insurance litigation if they "are related to the facts of the case at issue"). Only those portions "relevant to processing the claim in question" are discoverable, as they may show *inter alia* that agents of an insurance company recklessly

disregarded standard interpretations of a particular contractual provision in denying coverage or deliberatively omitted certain investigatory steps. See, e.g., Robertson, 1999 WL 179754, at *6 (requiring production of information contained in procedure manuals setting forth insurance company practices for handling claims for underinsured motorist benefits); Kaufman v. Nationwide Mutual Ins. Co., 1997 WL 703175, at *2 (E.D. Pa. 1998) (requiring insurance company to produce information contained in manuals and newsletters to the extent that information concerns procedures used by employees who directly handled plaintiff's claims). Consequently, defendant shall be required to produce all materials identified in requests 16, 17, 18, and 30 to the extent that they relate to or concern the motorcycle exclusion of the plaintiffs' policy, including definitional sections of these materials.[8]

3. Document Request 20

Document Request 20 requires defendant to produce materials exchanged between the parties that relate to the issuance of the policy, the selection of beneficiaries under the policy, and the meaning or interpretation of terms or provisions and exclusions under the policy. Defendant claims that it has already produced all non-privileged portions of its claims file. (Def. Mem. In Opp'n to Pl. Mot., at 15). Defendant further claims that documentation relating to the issuance of the policy, the selection of beneficiaries, and sales literature are irrelevant. (Id.).

This Court initially notes that the materials requested in Document 20 might fall outside of defendant's claim file. Furthermore, the information related to the selection of beneficiaries is relevant to both the breach of contract and bad faith causes of action, particularly because

[8]This Court will not limit production only to those portions of materials sent to employees who directly handled plaintiffs' claim, as the failure to provide interpretative, training, and investigatory manuals to those agents who processed plaintiffs' claim may provide evidence of bad faith.

defendant has denied the allegation that plaintiffs are eligible beneficiaries of the policy pursuant to the operation of the policy's beneficiary clause. (See Answer to Complaint, at ¶21). Finally, other materials, such as sales, marketing pamphlets, booklets, or other correspondence exchanged between the parties concerning the issuance of the policy, may be relevant to the litigation to the extent that these materials contain information concerning or interpreting the motorcycle exclusion to the policy. Consequently, defendant shall be required to produce (I) the correspondence, applications, or written exchanges that relate to the selection of beneficiaries under the policy; and (ii) all non-privileged materials included within the scope of Document Request 20 that relate to the meaning, interpretation, or application of the motorcycle exclusion of plaintiffs' insurance policy.

4. Document Request 31

Document Request 31 requires defendant to produce copies of defendant's financial statements for the past five years. Defendant objects on the basis that this request is unduly burdensome, overly broad, and irrelevant. (Def. Mem. In Opp'n to Pl. Mot., at 17).

Plaintiff offers no basis for why defendant's financial information is relevant. Presumably, plaintiff requests this information as part of its claim for punitive damages. Under Pennsylvania law, the wealth of a defendant is a factor to be considered in determining a punitive damage award. See Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800, 803 (Pa. 1989) (wealth of tortfeasor relevant to effectuate policies behind punitive damages of punishing tortfeasor and deterring future conduct). The Supreme Court's recent decision in State Farm Mutual Automobile Ins. Co. v. Campell, 538 U.S. 408 (2003), merely reiterates this contention, noting

that the wealth of a defendant can not justify an otherwise unconstitutional punitive damages claim, but that wealth may be one factor in the overall calculus. Id. at 427.

Defendant has not filed a motion to dismiss the complaint with respect to the punitive damage claims. See, e.g., Hatchell v. Advanced Neuroscience Corp., 1995 WL 214407, at * 1 (E.D. Pa. April 7, 1995) (permitting discovery of defendant's wealth in claim for punitive damages because defendant was not successful in challenging sufficiency of complaint). Nor has defendant filed a motion to sever the liability and damages phases of the litigation. Accordingly, so long as plaintiffs' punitive damage claim remains viable, plaintiffs shall be entitled to take lawful discovery on this issue at this time. Plaintiffs' request of defendant's financial statements for the past five years is relevant to whether defendant is presently able to pay punitive damages. See, e.g., Thompson v. Glenmede Trust Co., 1993 WL 410283, at *6 (E.D. Pa. Sept. 19, 1993) (noting that "it is well settled that evidence of a defendant's financial condition is admissible for purposes of ascertaining the appropriateness and amount of punitive damages" and requiring that defendants produce annual financial statements between 1988 and 1993). Defendant shall therefore be required to respond to Document Request 30.

D. Conclusion

For the foregoing reasons, plaintiffs' motion to compel discovery is granted in part and denied in part. An order consistent with this opinion follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARRY MCCRINK, SR., ET AL.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PEOPLES BENEFIT LIFE INSURANCE COMPANY	:	NO: 2:04-cv-01068-LDD
	:	

ORDER

AND NOW, this _____ day of November 2004, upon consideration of Plaintiffs' Motion to Strike Objections and Compel Discovery Responses (Doc. No. 12) and Defendant's response thereto (Doc. No. 15), it is hereby ORDERED that plaintiffs' motion is GRANTED in part and DENIED in part. It is hereby further ORDERED as follows:

1. Plaintiffs' Motion to Compel is denied as to Interrogatories 1 and 30, although Defendant shall answer Interrogatory 1 at the end of the discovery period.

2. Plaintiffs' Motion to Compel is granted as to Interrogatories 13, 14, 15, 19, 20, 26, and 27.

3. Plaintiffs' Motion to Compel is granted as to Interrogatory 2 to the extent that Interrogatory 2 calls for the factual reasons for denying Plaintiffs' claim.

4. Plaintiffs' Motion to Compel is granted with respect to Document Request 31.

5. Plaintiffs' Motion to Compel is granted with respect to Document Requests 16, 17, 18, and 30 to the extent that the requested documents relate to or concern the motorcycle exclusion of the Plaintiffs' insurance policy.

6. Plaintiffs' Motion to Compel is granted with respect to Document Request 20 to the extent that the requested materials relate to the selection of beneficiaries or to

the meaning, interpretation, or application of the motorcycle exclusion of the Plaintiffs' insurance policy.

7. Plaintiffs' Motion to Compel is denied with respect to Document Requests 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 22, 26, and 33 to the extent that these Document Requests seek documents identified in the privilege log as PB-00068, PB-00069, PB-00070-73, PB-00109, PB-00121, and PB-00209. It is granted to the extent that defendant still retains non-privileged documents responsive to these Document Requests.

8. Defendant shall submit documents identified in the privilege log as PB-0051, PB-0052, PB-0054, and PB-0063 to the Court for in camera review within 10 days from the date of this order. Defendant shall also submit, within 10 days from the date of this order, all additional privileged documents that are responsive to document requests 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 22, 26, and 33.

BY THE COURT:

_____
Legrome D. Davis, J.