



both the attorney-client and the work product privilege, plaintiff bases this motion only on the asserted inapplicability of the attorney-client privilege to his claims file. Neither party has requested in camera review of the file.

Plaintiff does not deny that the communications between Allstate and its counsel epitomize the attorney-client privilege.<sup>1</sup> He argues, however, that because defendant's very handling of his claim is at issue, all aspects of that handling, including the exchange of information between Allstate and its counsel, must be open to plaintiff. Neither the statute, the Pennsylvania courts nor our court of appeals have addressed whether the attorney-client privilege admits of an exception in insurer bad faith cases.<sup>2</sup> Two judges from this court, however, have addressed the slightly different area of the interplay between insurer bad faith claims and the work product privilege.

In Fidelity and Deposit Company of Maryland v. McCulloch, Judge

---

1. The elements of the attorney-client privilege, codified at 42 Pa. C.S.A. § 5928, are that the asserted holder of the privilege is or sought to become a client; that the person to whom the communication was made is a member of the bar, and that in connection with the communication he is acting as an attorney; that the communication related to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing primarily either an opinion of law or legal services, and not for the purpose of committing a crime or tort, and the privilege has been claimed and not waived by the client. Rhone-Poulenc Rorer Inc. v. The Home Indemnity Co., 32 F.3d 851, 862 (3d Cir. 1994).

2. In Klinger v. Mut. Auto. Ins. Co., 115 F.3d 230 (3d Cir. 1997), the insurance company's attorney testified as to the specific advice he gave his client, but it appears from the district court opinion that the putative privilege-holder -- the insurance company -- called the attorney as a witness in an effort to distance itself from his "neglect." 895 F.Supp. 712. Thus in Klinger neither the court of appeals nor the district court reached the privilege issue.

Joyner noting the lack of caselaw from this court or the court of appeals, rejected a claim for the entire claims file, and he termed the proposition that such claims present an exception to the work product doctrine "fairly remarkable." 168 F.R.D. 516, 524 (E.D. Pa. 1996). In Hartman v. Banks, which involved a claim for the intentional infliction of emotional distress based upon an allegation of "extreme and outrageous behavior" by the insurance company (extortionate threats to settle), Judge Pollak ordered the defendant to turn over the work product, i.e., the claims file, to determine whether the defendants were aware of its agent's alleged tortious behavior. 164 F.R.D. 167, 170 (E.D. Pa. 1995). Here, as stated, plaintiff's do not question defendant's assertion of the work product privilege, and there is no allegation of the type of tortious behavior that placed defendant's state of mind directly at issue in Hartman.

In light of the dearth of case law squarely addressing whether the bad faith statute creates an exception to the attorney-client privilege, I will deny plaintiff's motion, as I cannot find that he has overcome defendant's assertion of privilege. Moreover, defendant has failed to demonstrate the relevance of Allstate's counsel's state of mind to its cause of action; plaintiff has not credibly argued that an exception to the attorney-client privilege may be grounded on Allstate's outside counsel's status as a "business agent" or de facto claims

adjuster, and I note that defendant has disclaimed any intention of relying upon the advice of counsel as an affirmative defense in support of the reasonableness of its decision. See Rhone-Poulenc Rorer Inc. v. Home Indemnity Company, 32 F.3d 851, 863 (3d Cir. 1994).

An order follows.

