

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

NATIONWIDE MUTUAL INSURANCE COMPANY,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
STACY PERRY DIMENICHI, et al,	:	
Defendants	:	NO. 03-2580

**MEMORANDUM AND ORDER**

Gene E.K. Pratter, J.

December 9, 2004

The parties to this insurance coverage declaratory judgment action present the Court with a discovery dispute that requires consideration of the typically tricky application of the attorney-client privilege and work product doctrine in the context of the potentially problematic relationship between and among an insured, an insurer, and defense and/or coverage counsel. The insurer, Nationwide Mutual Insurance Company, appeals to this Court from the September 2, 2004 Discovery Order of Magistrate Judge Arnold Rapoport.

Magistrate Rapoport ordered Nationwide, *inter alia*, to produce documentation of communications between and/or among its claims and law departments' personnel and lawyers at Swartz Campbell & Detweiler, the firm Nationwide claims it retained to represent it once the insurer perceived the potential eruption of a coverage dispute between it and Defendant Stacy DiMenichi, Nationwide's insured. The Defendants who seek the disputed discovery essentially argue that either DiMenichi believed the internal Nationwide claims and legal personnel and the Swartz Campbell & Detweiler lawyers were on her legal "team" in underlying litigation or they inserted themselves into the handling of her defense without clearly warning her that they were

not acting on her behalf so that those lawyers' and Nationwide personnel's communications about the underlying DiMenichi case are not protected from disclosure to her (or her assignees, the Potochnicks).<sup>1</sup>

For reasons explained below, the Court has concluded that the parties have not presented the Court with sufficient evidentiary support to resolve this discovery dispute on the basis of the parties' and lawyers' relationships inter se.<sup>2</sup> However, by undertaking an in camera review of each of the 261 withheld documents, the Court has determined that a significant number of the documents, in whole or in part, do not contain information that falls within a conventional interpretation of the attorney-client privilege and/or work product doctrine, largely because so much of the information contained in them is merely factual recitation of pleadings filed, meetings held or conversations had with persons outside even Nationwide's description of the confidential lawyer-client relationship. Hence, the Court affirms in part the September 2, 2004

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<sup>1</sup> It is not clear whether DiMenichi claims that she was at all relevant times part of a 3-way confidential relationship and therefore the withheld information simply is not privileged as to her or whether, even if the material is privileged, she is entitled as a member of the attorney-client relationship to, and does, waive the privilege. For present purposes it is not necessary to determine which analytical avenue is more appropriate to follow in this case.

<sup>2</sup> Having been presented with Nationwide's Notice of Objection to and Appeal (Docket No. 42) from Magistrate Judge Arnold Rapoport's September 2, 2004 Order (Docket No. 41), the Potochnicks' Motion for Sanctions and/or Compulsion (Docket No. 51), and DiMenichi's Joinder to the Potochnicks' Motion for Sanctions and/or Compulsion (Docket No. 53), the Court conducted a conference with counsel on October 28, 2004 and directed the parties to work together to provide the Court with a time line of relevant underlying events, a list of relevant dramatis personae, a privilege log and copies of the withheld documents in order to facilitate the Court's in camera review of the disputed material. Unfortunately, what was anticipated to be a relatively straightforward submission was turned into a cumbersome and somewhat contentious process, lacking the hoped for clarity of the essential information. Presumably, Magistrate Judge Rapoport also found the record similarly lacking and chose instead to address the discovery dispute presented to him for expeditious resolution as reflected in the September 2, 2004 Order.

Order to the extent set forth in the accompanying Order and modifies the September 2, 2004 in part as delineated in the same accompanying Order.

### Discussion

A brief description of the case is helpful in understanding this discovery dispute. Defendant Stacy DiMenichi was in a car accident on June 15, 1988 with Defendants John and Carol Potochnick. Nationwide insured the car DiMenichi was driving. Ultimately, at trial DiMenichi was found liable and the jury returned a verdict of \$6 million on October 16, 2002.<sup>3</sup> Prior to the commencement of the trial, however, DiMenichi had filed for bankruptcy. DiMenichi had not informed the trial court of the bankruptcy filing because, she alleges, she believed the personal injury suit was a matter of concern only for Nationwide, not for her.

DiMenichi claims she had informed her insurer-appointed defense counsel of the bankruptcy but he did not so inform the trial judge in the underlying suit, until after the jury returned their verdict. Nationwide claims it had no knowledge of the bankruptcy. In an October 25, 2002 conference, the specifics of which appear to be at the root of many aspects of this discovery dispute, many Nationwide representatives and outside attorneys (including the lawyer who had handled the underlying trial on behalf of DiMenichi and lawyers from the Swartz Campbell & Detweiler firm who were brought in by Nationwide after the verdict was lodged) met and discussed “post-trial motions.”

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<sup>3</sup> Although the jury returned this verdict on October 16, 2002, the bankruptcy stay and post-trial appeals filed by DiMenichi (who was represented by counsel retained by Nationwide pursuant to the applicable insurance policy) resulted in no final judgment being issued until January 30, 2004. This judgment includes delay damages and costs and is in the amount of \$10,787,397.25. This judgment was appealed, and the Pennsylvania Superior Court upheld the judgment on October 13, 2004.

DiMenichi and the Potochnicks, along with the bankruptcy trustee and bankruptcy judge, crafted a resolution of the underlying case where the Potochnicks would pay off all other creditors in DiMenichi's bankruptcy and would waive their right to collect damages beyond Nationwide's coverage, and the bankruptcy stay would be lifted. Nationwide argues this was a fraudulent act and filed this action on April 25, 2003, seeking a declaratory judgment that it need not honor any claim arising out of the Potochnick-DiMenichi accident.

For immediate purposes the crux of the discovery dispute centers around the roles of the internal Nationwide staff and the Swartz Campbell & Detweiler lawyers vis á vis DiMenichi. Nationwide contends that its claims and legal staffs owed no duties to DiMenichi such as would expose their internal documents to discovery production to her and that the Swartz Campbell & Detweiler lawyers only ever were Nationwide's coverage counsel and never accepted or performed any professional duties on behalf of DiMenichi. Therefore, Nationwide raises the attorney-client privilege and work product doctrine to contend that its personnel's documents, as well as those of the various Swartz Campbell & Detweiler lawyers, are protected from discovery by DiMenichi and the Potochnicks.

The basic requirements that must be met in order to assert the attorney-client privilege are essentially consistent from court to court. However, the articulations of those requirements vary.

Federal courts sitting in diversity, as in this case, apply the law of the host state to determine privilege. FED. R. EVID. 501; see also United Coal Co. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir.1988) (holding that federal courts must look to state attorney-client privilege laws in diversity cases); Coregis Ins. Co. v. Law Offices of Carole F. Kafriksen, P.C.,

186 F. Supp. 2d 567, 569 (E.D. Pa. 2002) (same). Many courts have adopted the privilege elements set out by Dean Wigmore:

(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser and (8) except the protection be waived.

8 Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961).

Pennsylvania's statutory attorney-client privilege, 42 PA. CONS. STAT. ANN. § 5928 (West 2004), entitled "Confidential communications to attorney," provides:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same unless in either case this privilege is waived upon the trial by the client.<sup>4</sup>

Unlike the attorney-client privilege, the work product doctrine rule is a substantive federal law, and therefore the Court applies the federal work product rule codified in Federal Rule of Civil Procedure 26(b)(3). This rule is not intended to encompass all documents created by an attorney, but only material "prepared in anticipation of litigation or for trial" by the client or the client's lawyers or other representative. FED. R. CIV. P. 26(b)(3). This protection is not absolute and can be overcome, "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Id.

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<sup>4</sup>As has been noted in Coregis, supra, this statutory language does not expressly shield communications from the lawyer to the client. There is also a recognized corollary that extends the privilege to communications from the lawyers to the client if disclosure would necessarily reveal confidences imparted to the lawyer by the client. Based upon the Court's conclusions here, it is not necessary to discuss how that view of the narrow scope of the privilege would govern this dispute.

Although certain types of material, namely “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” *id.*, receive a high degree of protection, most of the material presented to the Court in this case and in the instant dispute does not meet this description.

As is immediately clear from the foregoing recitation of the privilege rubric and the work product doctrine, there are two key issues that would need to be analyzed and determined before declaring whether either or both could apply to any of these documents: was DiMenichi ever entitled to claim “client” status as to the lawyers and law department personnel whose documents are the subject of this dispute and, if so, by what point in time, if any, did that entitlement come to an end? While the parties’ submissions make many energetic arguments on these points, they do so without presenting the Court any actual evidence<sup>5</sup> on which to base a ruling. Accordingly, the Court’s review of the withheld documents<sup>6</sup> concentrated on the text and the substance of the documents rather than a document’s date or the identity of the author or recipient of the document. That review disclosed that many of the withheld documents could not be fairly described as reflecting either the request for or rendering of legal advice, and neither do they contain the mental impressions, etc. of a lawyer or others analyzing potential issues in

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<sup>5</sup> If, after consideration of the Order accompanying this Memorandum, any party determines to pursue this issue for pre-trial purposes, the Court will entertain a motion request for an evidentiary hearing on the question of DiMenichi’s status as a client.

<sup>6</sup> The documents reviewed *in camera* were those contained in three bound volumes containing tabbed documents. The volumes were titled: Fourth Amended Privilege Log, Plaintiff Nationwide Mutual Insurance Company’s Amended Privilege Log Regarding Documents Withheld from File of Scott Freeland, Esq., and Plaintiff Nationwide Mutual Insurance Company’s Supplemental Privilege Log Regarding Documents Withheld from File of Scott Freeland, Esq.

anticipation of or in the throes of litigation. Rather, the Court found that large segments of many of the withheld documents contained recitations of factual information as to various court filings, who said what in meetings or conversations with persons outside the lawyer-client relationship claimed by Nationwide, and the like. As to those documents, before producing them to Defendants, Nationwide will be permitted to present to the Court for the Court's further review copies of such documents with proposed redactions of any material Nationwide still contends is privileged or work product. Other documents will be ordered to be produced in their current form, and still others need not be produced because on their face they are privileged or covered by the work product doctrine under any interpretation of the facts as they appear under any of the various contentions in this case.

In conducting this review and evaluating Nationwide's claim of non-discoverability of these various documents, the Court is mindful that 28 U.S.C. § 636(b)(1)(A) permits the district court to refer pretrial matters to a magistrate judge for resolution and provides that if any party objects to the decision of the magistrate judge, the party may appeal to the district court but may be expected to show that the magistrate judge's order is clearly erroneous or contrary to law. Only an indulgent reading of Nationwide's submission challenging Magistrate Judge Rapoport's Order would permit the conclusion that the Order was "clearly erroneous" or contrary to law as to several of the more than 261 documents still at issue. However, it appears that the manner of the prior presentation of the issues and the exigencies of the discovery disputes in this case as presented to Magistrate Judge Rapoport in this instance may not have permitted full consideration of each document as has now been undertaken.

An Order in keeping with this Memorandum follows.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE



Documents Withheld from File of Scott Freeland, Esq., Plaintiff Nationwide Mutual Insurance Company's Supplemental Privilege Log Regarding Documents Withheld from File of Scott Freeland, Esq., and the Fourth Amended Privilege Log, it is hereby ORDERED that Nationwide's Notice of Objection to and Appeal from Magistrate Judge Rapoport's Order (Docket No. 42) is GRANTED in part and DENIED in part, and the September 2, 2004 Order of Magistrate Judge Rapoport is upheld in part and amended in part as follows:

I. Amended Privilege Log Regarding Documents Withheld from File of Scott Freeland, Esq.<sup>1</sup>

A. Documents that need not be produced:

Tab Nos. 18, 31, 36, 37, 40, 43, 47, 51, 56, 68, 78, 79, 82, 84, 86, 87, 92, 95, 98-116, 118, 121, 126, 127, 130, 136-150, 158, and 173.

B. Documents that shall be produced to Defendants within 1 week of the date of this Order:

Tab Nos. 10, 21, 28, 38, 42, 57, 58, 61, 119, 132, 133, 152, 160, and 175.

C. Documents which are discoverable at least in part and which Nationwide may either produce to Defendants in their current form within one week of the date of this Order without such production being treated by this Court as a waiver of the attorney-client privilege and/or work product doctrine or may submit in proposed redacted form to the Court within one week of the date of this Order for further review by the Court prior to production:

Tab Nos. 1-9, 11-17, 19, 20, 22-27, 29, 30, 32-35, 39, 41, 44-46, 48-

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<sup>1</sup> This bound volume contained no documents under tabs 120 and 162-167. Nationwide shall forward the missing documents to the Court within one week of the date this Order or supply the Court an explanation as to why they were not submitted.

50, 52-55, 59, 60, 62-67, 69-77, 80, 81, 83, 85, 88-91, 93,  
94, 96, 97, 117, 122-125, 128, 129, 131, 134, 135, 151,  
153-159, 161, 168-172, and 174.

II. Supplemental Privilege Log Regarding Documents Withheld from File of Scott  
Freeland, Esq.

A. Documents that need not be produced:

Tab Nos. 3, 4, 8, and 16.

B. Documents that shall be produced to Defendants within 1 week of the date  
of this Order:

Tab Nos. 5 and 17.

C. Documents which are discoverable at least in part and which Nationwide  
may either produce to Defendants in their current form within one week of  
the date of this Order without such production being treated by this Court  
as a waiver of the attorney-client privilege and/or work product doctrine or  
may submit in proposed redacted form to the Court within one week of the  
date of this Order for further review by the Court prior to production:

Tab Nos. 1, 2, 6, 7, 9-15, and 18.

III. Fourth Amended Privilege Log

A. Documents that need not be produced:

Tab Nos. 20, 23, 34, 39, 42, 47, 59, 61, 65, 66, and 68.

B. Documents that shall be produced to Defendants within 1 week of the date  
of this Order:

Tab Nos. 24, 32, 35, 38, and 53.

C. Documents which are discoverable at least in part and which Nationwide  
may either produce to Defendants in their current form within one week of  
the date of this Order without such production being treated by this Court  
as a waiver of the attorney-client privilege and/or work product doctrine or

may submit in proposed redacted form to the Court within one week of the date of this Order for further review by the Court prior to production:

Tab Nos. 2-19, 21, 22, 25-31, 33, 36, 37, 40, 41, 43-46, 48-52, 54-58,  
60, 62-64 and 67.

It is also ORDERED that Nationwide shall produce within one week of the date of this Order copies of the fee statements of Swartz Campbell & Detweiler for legal services rendered but may redact all textual references to fee rates or amounts and to consultative communications exclusively with Nationwide personnel or with any attorney as to whom there is a written engagement letter documenting such attorney's retention to provide legal services to Nationwide itself (rather than for a Nationwide insured).

It is further ORDERED that the Potochniks' Motion for Sanctions and/or Compulsion (Docket No. 51) is DENIED to the extent that it requests relief beyond the relief granted in this Order.

BY THE COURT:

/S/  
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GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE