

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

SAFEGUARD LIGHTING SYSTEMS, : CIVIL ACTION  
INC., et al. :  
 :  
v. :  
 :  
NORTH AMERICAN SPECIALTY :  
INSURANCE CO. : NO. 03-4145

MEMORANDUM

Bartle, J.

December 30, 2004

Before the court is the motion of plaintiffs, Safeguard Lighting Systems, Inc. ("Safeguard"), Safeguard International, Ray Royce, and Rita Royce, to compel discovery against defendant North American Specialty Insurance Co. ("North American") in an action for breach of contract, bad faith, and unfair trade practices arising out of insureds' claim for water damage.

Plaintiffs seek documents created by defendant's claims adjusters, as well as those prepared by defendant's counsel Michael Henry, Esq., and the law firm of Cozen O'Connor relating to the investigation and adjustment of Safeguard's loss which occurred December 28, 2000. North American objects to the production of these documents on the grounds of attorney-client privilege and the work product doctrine. Plaintiffs also seek production of documents pertaining to defendant's reserves, to which defendant objects under the work product doctrine and as not relevant or reasonably calculated to lead to the discovery of admissible evidence. Finally, plaintiffs seek North American's

claims adjustment manuals. North American objects to the production of these documents as not relevant or reasonably calculated to lead to discoverable information.

The attorney-client privilege protects disclosure of communications between an attorney and client. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981); Fed. R. Evid. 501. The purpose of this privilege is "to encourage clients to make full disclosure to their attorneys." Id. at 389 (quoting Fisher v. United States, 425 U.S. 391, 403 (1976)). The privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id. at 390.

The work product doctrine protects material prepared by an attorney as well as material prepared for an attorney in preparation for possible litigation. See United States v. Nobles, 422 U.S. 225, 238 (1975); Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138 (3d Cir. 2000). A party asserting the protection of work-product immunity bears the burden of showing that the materials in question qualify for such protection. Holmes, 213 F.3d at 138 (quoting Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992)). Nevertheless, "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal

theories of an attorney or other representatives of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

Plaintiffs first contend that North American improperly withheld documents generated by Joseph Rizzo, an outside claims adjuster, during the course of its investigation and adjusting of Safeguard's claims from March, 2001 onward. Plaintiffs further maintain that Michael Henry, Esq., of the law firm of Cozen O'Connor, was acting as an investigator and that documents generated by him or Cozen O'Connor cannot be considered protected work product until litigation is instituted. Finally, plaintiffs argue that even if Cozen O'Connor was acting as counsel rather than as a claims adjuster, any communications between it and North American's internal claims adjusters that were protected by the attorney-client privilege were waived when communications were shared with Mr. Rizzo. We note that counsel for North American has represented that the non-privileged portions of the reports of its adjusters, relating to North American's "ordinary course of business in the evaluation, analysis and adjustment of the claim" have been produced, as has the underlying factual material. Def. Resp. to Pl. Mot. to Compel, Dec. 3, 2004, at 5, 8.

While Mr. Henry was not formally retained until October 8, 2001, North American counters that litigation was repeatedly threatened, beginning as early as March 1, 2001 and that Mr. Henry acted at all times as counsel to North American. As attested to by Allan Leavitt, a claims supervisor at North

American, his communications with Mr. Henry throughout North American's investigation of the insureds' claim related to Mr. Henry's "views of the relevant factual evidence as it related to the policy terms, his opinions concerning coverage issues and his recommendations concerning litigation strategy." *Leavitt Aff.* ¶ 16, Dec. 3, 2004. Moreover, while the underlying factual information is discoverable and has been produced, Mr. Henry's letters setting forth his view of the facts and legal opinions are protected.

We disagree with plaintiffs' unfounded contention that litigation must have been instituted before the attorney-client privilege can take effect. *See Upjohn Co.*, 449 U.S. 383; Fed. R. Evid. 501. Furthermore, as stated above, the work product doctrine protects material prepared by an attorney as well as material prepared for an attorney in preparation for possible litigation. *See Nobles*, 422 U.S. at 238; *Holmes*, 213 F.3d at 138. Although Mr. Henry was formally retained in October, 2001, North American has proffered evidence that the possibility of litigation arose as early as March, 2001. There is no evidence that Mr. Henry was acting in a capacity other than as an attorney at any point. Therefore, at all relevant times an attorney-client relationship existed between Mr. Henry and North American.

North American maintains that because the claim was a complex one, it hired Mr. Rizzo of Rizzo and Associates, Inc. to take over the adjustment of the loss and act on behalf of North American as its agent. Mr. Rizzo held the same status as Mr.

Leavitt during this time. We agree with North American that Mr. Rizzo was its agent and his communications with Mr. Henry are protected by the attorney-client privilege. The presence of a third party who is an agent of the client will not destroy the attorney-client privilege. See In re Grand Jury Investigation, 918 F.2d 374, 386 n.20 (3d Cir. 1990).

Next we turn to the issue of the reserves. As we discussed in North River Ins. Co. v. Greater N.Y. Mutual Ins. Co., 872 F. Supp. 1411 (E.D. Pa. 1995):

State insurance law generally requires casualty insurance companies to set aside reserves upon notice of potential losses under their policies. See ... 40 Pa. Cons. Stat. § 115. The reserves are established to pay those losses upon settlement or when liability is established. The existence of these reserves also allows state insurance departments to monitor the financial condition of the insurance companies they regulate for the protection of insureds and the public.

North American listed on its privilege log several documents containing reserves information that it withheld from production. In its response to the plaintiff's motion to compel, defendant represents that the adjusters' reports already produced disclose some reserves-related information. North American argues that when it became evident that litigation was imminent, it redacted such information pursuant to the work product doctrine because it included mental impressions and opinions of North American and its agents. Mental impressions and opinions of the party and its agents, however, are not protected by the work product doctrine,

unless they are prepared for an attorney in preparation for possible litigation. See Nobles, 422 U.S. at 238; Holmes, 213 F.3d at 138. "Work product prepared in the ordinary course of business is not immune from discovery." Holmes, 213 F.3d at 138. Defendant does not argue that the reserves after that point were prepared in anticipation of litigation or other than in the normal course of business. We will not permit defendant to withhold the reserves on the ground of work product protection.

In the alternative, defendant argues that the motion to compel reserves information should be denied because the request is not relevant or reasonably calculated to lead to discovery of admissible information. As this court has stated on previous occasions, there is a "tenuous link between reserves and actual liability given that numerous considerations factor into" the calculation of reserves in accordance with statutory requirements. Fid. & Deposit Co. of Md. v. McCulloch, 168 F.R.D. 516, 525 (E.D. Pa. 1996). See also Robinson v. Hartford Ins. Co., No. Civ. A. 03-5618, 2004 WL 1090991, \*1 n.1 (E.D. Pa. May 11, 2004). "[R]equests for production of reserve information are not 'reasonably calculated to lead to the discovery of admissible evidence' concerning insurance policy interpretation." McCulloch, 168 F.R.D. at 525. In the present circumstances, we will not require production of defendant's reserve information.<sup>1</sup>

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1. The present situation is distinguishable from that in North River Ins. Co. because, as is pointed out in McCulloch, North River involved a situation in which liability was undisputed and  
(continued...)

Finally, we examine plaintiffs' motion as it pertains to claims handling manuals of North American. Defendant argues that claims manuals not used or reviewed by claims handlers in connection with a claim are not relevant or reasonably calculated to lead to discoverable material. Defendant maintains that it has a library of insurance literature including a North American Claim Technical Procedure Manual, which is a general outline on claim handling concentrating primarily on general liability lines of business. In addition, North American asserts that Mr. Leavitt relied on his fifteen years of experience rather than on this manual. Further, Mr. Leavitt did not provide Mr. Rizzo with any literature detailing claims handling procedures at North American.

We agree with North American insofar as requiring production of its entire library of insurance literature would be overly broad and unduly burdensome. However, any material which pertains to instructions and procedures for adjusting claims and which was given to the adjusters who worked on plaintiffs' claim may be relevant to the action and must be produced. See Kaufman, 1997 WL 703175, \*2.

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1.(...continued)

the question was whether the primary insurer's failure to settle the claim within policy limits was in bad faith. See North River Ins. Co., 872 F. Supp. at 1411; McCulloch, 168 F.R.D. at 525.

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ORDER

AND NOW, on this 30th day of December, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

- (1) the motion of plaintiffs to compel discovery against defendant is GRANTED in part and DENIED in part;
- (2) defendant promptly shall produce claims adjustment manual material pertaining to instructions and procedures for adjusting claims given to adjusters who worked on plaintiffs' claims; and
- (3) the motion is otherwise DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.