IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DUANE ADAM THOMAS	)	
	)	
Plaintiff	)	
	)	
v.	)	C.A. No. 01C-01-046 HDR
	)	
HARFORD MUTUAL INSURANCE CO. AND CONCENTRA MANAGED CARE INC.	)	
	)	
Defendants.	)	

Submitted: April 8, 2004
Decided: April 20, 2004

John S. Spadaro, Esq. and Roger E. Landon, Esq., Murphy, Spadaro & Landon, Wilmington, Delaware for Plaintiff.

Christian J. Singewald, Esq., White & Williams, LLP, Wilmington, Delaware and Andrew F. Susko, Esq., White & Williams, LLP, Philadelphia, Pennsylvania for Defendant Harford Mutual Insurance Co.

Gregory B. Williams, Esq., Fox Rothschild, LLP, Wilmington, Delaware and Jacqueline M. Carolan, Esq., Fox Rothschild, LLP, Philadelphia, Pennsylvania for Defendant Concentra Managed Care, Inc.

O P I N I O N

UPON HARFORD' S MOTION FOR RECONSIDERATION
OF COMMISSIONER' S ORDER COMPELLING DISCLOSURE
GRANTED

RIDGELY, President Judge

Thomas v. Harford, et al.
01C-01-046 HdR
April 20, 2004

Defendant Harford Mutual Insurance Company (" Harford") has moved the Court to reconsider a Commissioner's Order compelling Harford to produce certain documents it claims are protected under the attorney-client and work-product privileges. I have reconsidered the motion made before the Commissioner pursuant to Superior Court Civil Rule 132. I do not find violation of a prior order sufficient to justify a waiver of any privilege by Harford. Because Harford has not relied on particularized facts that implicitly rely on communications with counsel, nor a defense implicating the entire claims file, the considerations of fairness that justified the waiver of the attorney-client and work-product privileges in *Tackett* are not present in this case. Nor, can Thomas show a compelling need for the requested documents. Accordingly, Thomas's Motion to Compel Disclosure is denied and the Commissioner's order to the contrary is vacated.

I. BACKGROUND

Thomas was injured in an industrial accident on June 15, 1998. Harford is the worker's compensation insurer for Thomas's employer; Harford in turn employed Defendant Concentra Managed Care, Inc., to act as case manager and to interact directly with Thomas. Although Harford accepted Thomas's claim and Plaintiff had been examined by his own doctors, the insurer conditioned preapproval of payment for evaluation at Johns Hopkins Hospital on medical examinations of several Concentra-appointed doctors. According to Thomas, this delay in approving payment exacerbated a condition caused by the original accident. Thereafter,

Plaintiff filed this suit alleging numerous causes of action including bad faith and the reckless infliction of emotional distress.

In early 2003, Harford responded to Thomas' s request for production of documents. Objecting to the demand on attorney-client, work-product, and other grounds, Harford submitted a Privilege Log in lieu of the requested documents. Around this time, Thomas also served Harford with three interrogatories. In them, Thomas aimed to determine the extent Harford relied upon advice of counsel in handling his claim. Specifically, Thomas sought to ascertain (1) whether Harford " acted in reliance on advice given to it by its attorneys with respect to any coverage determination"; (2) the nature of the coverage determination and the identity of all related documents; and (3) whether such documents appeared in Harford' s Privilege Log.[1]

In response to the second interrogatory, Harford submitted brief, two- or three-word descriptions of the documents involving counsel that affected Thomas' s claim. Harford asserts these materials are protected by the attorney-client and work-product privileges. Thomas then filed the present motion seeking to compel Harford to produce the requested documents.

Thomas seeks production of two internal Harford documents: the adjuster' s notes and the correspondence between Harford and its counsel, Heckler and Fabrizzio. The former constitutes a chronological log detailing the claim-related

[1] Pl. Mot. before Comm. Freud, Ex. B, at 2.

actions of the adjuster assigned to Thomas' s claim, Matthew Stachowiak. The latter consists of letters between George B. Heckler and Mr. Stachowiak, variously discussing doctor' s reports, claims strategy, and the progression of Thomas' s condition. Harford insists that the adjuster' s notes are protected by the attorney-client privilege and that the correspondence is protected as attorney work-product.

On April 1, 2004, Commissioner Freud entered an order compelling Harford to turn over the documents.[2] The Commissioner found that Harford had violated a previous order of hers that directed Harford to describe with specificity the materials it claimed were privileged. Harford has moved for reconsideration and my *de novo* review, claiming the Commissioner' s order disrupts the sanctity and integrity of the attorney-client and work-product privileges. Harford at oral argument has represented it does not rely on any advice of counsel defense and that it does not intend to call its counsel to testify. I have reviewed the documents *in camera,* the transcript of the proceeding before the Commissioner, and have reconsidered the issues presented.

II. DISCUSSION

Superior Court Civil Rule 26(b)(3) shields attorney materials prepared in anticipation of litigation unless certain criteria are met. This rule, which focuses on

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[2] *See* Comm.'s Order (April 1, 2004), at Def. Harford Mot. Ex. C ("Harford shall immediately produce to Mr. Thomas the forty documents listed on [its July] interrogatory responses . . . .").

the attorney's work-product, provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party . . . only 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. In ordering the 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 representative of a party concerning the litigation.[3]

Despite early optimism regarding the identical federal counterpart,[4] the work-product doctrine in application turned out to be both complex and controversial,[5] especially in the insurance context.

In particular, restricting access to the claim file through a narrow

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[3] DEL. R. CIV. P. 26 (b)(3).

[4] FED. R. CIV. P. 26 (b)(3). As to judicial optimism, see *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 410 (E.D. Va. 1975) ("The provisions of [Federal] Rule 26 (b)(3) are straightforward and easily understood. No interpretation or construction seems necessary.").

[5] *See* FED. R. CIV. P. 26 Advisory Committee Note; *see also Duplan Corp. v. Moulinage et Retorderie De Chavanoz*, 509 F.2d 730 (4th Cir. 1974) ("The most controversial problem in the discovery area"), cert. denied, 420 U.S. 997 (1975); *Developments in the Law, Discovery*, 74 HARV. L. REV. 942, 1027 (1961) ("[U]ndoubtedly the most controversial problem in the discovery area"); Annotation, *Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine*, 35 A.L.R.3d 412, 422 (1971) ("[O]ne of the most controversial problems in the discovery area").

interpretation of " substantial need" could erect a barrier to proving bad faith.[6] On the other hand, a broad discovery rule, when combined with the availability of punitive damages, may unduly inhibit attorney-client discussion.[7] The work-product doctrine, in shielding attorney impressions, balances these considerations by encouraging trial preparation;[8] deterring attorneys from altering their preparation methods to avoid a written record;[9] and effectively bypassing the undesirable possibility of a party' s attorney being called as a witness.[10] But because of the adversarial nature of the insurance business – with coverage disputes often ending in litigation between insurer and insured – materials prepared by insurance

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[6] *Reavis v. Metropolitan Property and Liability Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987).

[7] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[8] *See* D. Christopher Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 684-85 (1986).

[9] *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."); *but cf.* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S. CT. REV. 309, 362 (questioning whether attorneys would actually "stop taking notes.").

[10] *See Hickman*, 329 U.S. at 517 (Jackson, J., concurring) (arguing that opposing counsel could impeach adverse witnesses' credibility by calling their attorneys to testify to pre-litigation conversations).

companies for other purposes are arguably also for purposes of litigation.[11]

Even outside the insurance context, the work-product doctrine is distinct from other privileges. For instance, the doctrine restricts the scope of otherwise permitted discovery.[12] And unlike most other privileges, such as that between attorney and client, the work-product privilege belongs to the attorney rather than the client.[13] In addition, although attorney involvement is not necessary to invoke the privilege, " documents prepared in the ordinary course of business are not within the purview of Rule 26 (b)(3)."[14]

The confluence of these rules of discovery and privilege with a bad faith coverage claim thus invokes competing concerns. In deciding the proper scope of discovery the Court, must be cognizant of a plaintiff' s burden-of-proof and the need to counter any defense based on the advice of counsel. At the same time, the Court must also be cognizant of the procedural and substantive boundaries of well-established rules of privilege and their purposes. As one commentator has put it:

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[11] Mary Beth Brookshire Young, *The Work Product Doctrine: Functional Considerations and the Question of the Insurer's Claim File*, 64 U. CHI. L. REV. 1425, 1426 (1997) ("[I]nsurance discovery disputes force courts to consider how to treat materials that are arguably prepared in anticipation of litigation, but are used for other purposes as well.").

[12] *See* DEL. R. CIV. P. 26 (b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

[13] *Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976).

[14] *Clausen v. Nat'l Grange Ins. Co.*, 730 A.2d 133, 140 (Del. Super. Ct. 1997) (citing *Mullins v. Vakili*, 506 A.2d 192, 194 (Del. Super. Ct. 1986)).

> Although [the purposes behind the work-product doctrine] are not served to the extent that one party's attorney hoards any information pertinent to the issues in a lawsuit, forcing the hoarding attorney to disclose his information would handicap achievement of other goals arguably central to our adversarial system: full preparation and zealous advocacy.[15]

Most courts have agreed, at minimum, that some discovery of these materials is appropriate. This treatment in turn suggests that the rationale for the doctrine:

> . . . rests not so much on the fear of unfairness or sharp practices as on the desire to promote the effectiveness of the adversary system by safeguarding the vigorous representation of a client's cause from the possibly debilitating effects of susceptibility to discovery.[16]

Although codified in 1970, Rule 26 (b)(3) was not thoroughly examined in the bad faith context until several decades later, when the Delaware Supreme Court took up the case of *Tackett v. State Farm Fire and Casualty Insurance Company.*[17] In *Tackett*, the Court held that Rule 26(b)(3)'s mandatory prescription to "protect against disclosure" requires only additional, and not absolute, protection in the context of the bad faith insurance claim.[18] After settling with the negligent driver responsible for his injuries for the amount of the driver's insurance policy, Tackett

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[15] Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 919 (1983).

[16] *Discovery*, 74 HARV. L. REV. at 1028.

[17] 653 A.2d 254 (Del. 1995).

[18] *Id*. at 262.

sought to recover under his $50,000 underinsured-motorist policy, a policy covered by defendant State Farm. After a lengthy delay, Tackett filed an action for intentional infliction of emotional distress, alleging State Farm had delayed payment of his policy in bad faith. During the course of the ensuing discovery, State Farm asserted several privileges and refused to provide documents relating to Tackett's claim file. After the Superior Court ordered *in camera* review of the contested documents, State Farm filed an interlocutory appeal. Although it acknowledged the value of the attorney-client and work-product privileges, the Supreme Court nonetheless agreed that discovery should proceed and affirmed the Superior Court's judgment.

The Court in *Tackett* rejected State Farm's claim under the attorney-client privilege, holding that the insurer had implicitly waived its right to assert such a defense.[19] Specifically, an implicit waiver requires a " disclosure of even a part of the contents of a privileged communication,"[20] and a showing that such disclosure " place[s] the party seeking discovery at a distinct disadvantage due to an inability to examine the full context" of the partially-disclosed details.[21] Waiver thus rests on

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[19] *See id.* at 260 ("[W]here an insurer makes factual representations which implicitly rely upon legal advice as justification for non-payment of claims, the insurer cannot shield itself from disclosure of the complete advice of counsel relevant to the handling of the claim.").

[20] *Citadel*, 603 A.2d at 825.

[21] *Zirn*, 621 A.2d at 782.

a "rationale of fairness," which in turn aims to prevent disclosure of information "under circumstances where it would be unfair to deny the other party an opportunity to discover other relevant facts."[22]

The central issue in this case is whether Harford and Concentra breached their duty of good faith and fair dealing when they failed to preapprove payment for the evaluation and diagnosis of a degenerative medical condition. In bringing his claim, Thomas has sought the documents related to Defendants' decision making process, materials that fall under the traditional definition of "work product" and scope of the attorney-client relationship, and which are normally privileged. As discussed above, however, there are countervailing considerations in the bad faith insurance context, chief among them the plaintiff's ability to discover the details surrounding an insurer's decision to deny or delay payment of a claim. The Supreme Court has previously found that the materials sought, at a minimum, are sufficiently related to the underlying cause of action such that a reasonable person could entertain a "good faith belief" that a review of the contested documents "may reveal evidence to establish a claim."[23]

Here, the requested materials implicate Defendants' claim-related decisional process, *i.e.*, the internal deliberations between Harford and counsel regarding past examinations and the efficacy of further treatment. Keeping in mind that documents

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[22] *Tackett*, 653 A.2d at 259.

[23] *See id.* at 263.

have not been ordered disclosed when they show " normal business and lawyer practices," [24] the Court will only order the production of the adjuster' s notes if it is directed to the " pivotal issue" of the litigation, *i.e.*, Harford' s allegedly unreasonable claims handling. Similarly, Thomas must show a " compelling need" for the Harford-Heckler correspondence before the Court will order production of those documents.

Before the Commissioner, Thomas asserted that an insurer need not assert an advice-of-counsel defense to make the underlying documents discoverable.[25] Because the Heckler firm was directly involved on a regular basis in giving advice regarding handling his claim, Thomas argues that the reasoning in *Tackett*, which supports full production, controls.[26]

In *Tackett*, State Farm revealed portions of the claim file in asserting a " routine handling" defense. By doing so, the insurer alleged " particularized facts that implicitly relied upon communications with counsel,"[27] thereby satisfying the disclosure component of the waiver analysis. In its pleadings, Harford has made no such assertion. The closest Harford comes is in its fourth affirmative defense:

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[24] *Kemper Insurance v. Soligo*, 1996 Del. Super. LEXIS 141, at *7.

[25] Tr. of Comm. Hearing, at 5.

[26] *Id*. at 8.

[27] *Tackett*, 653 A.2d at 259.

> The medical records, at the time when presented to [Harford], did not document the medical reasonableness and necessity for the treatment and, therefore, the plaintiff's claim that preapproval should have been given is without merit.[28]

Although Harford there focuses on Thomas's actions, not its own internal discussions with counsel, a review of the adjuster's notes reveals communications with counsel about the claim.

In *Soligo*, Judge Quillen expressed his reservations in compelling the production of documents evidencing only "normal" attorney practices. There, the documents did not reveal information that a "reasonable person acting in good faith would believe to be evidence establishing the plaintiff's claim."[29] Here, the adjuster's notes reveal information arguably relevant to a determination of reasonableness. But the fairness considerations implicated in *Tackett*, which justify a document's production despite its privileged nature, are not present. Nor will there be any evidence at trial that Harford acted on advice of counsel. Harford has not revealed any portion of its claims file expressly or implicitly. The equitable foundation of implicit waiver, that a party "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder,"[30] is absent from Harford's defense.

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[28] Def. Harford's Ans. at 25.

[29] *Soligo*, 1996 Del. Super. LEXIS 141, at *6.

[30] *Clausen v. National Grange Mut. Ins. Co.*, 730 A.2d 133, 138 (Del. Super. Ct. 1997) (citing 8 WIGMORE, EVIDENCE § 2327).

Judge Quillen echoed this sentiment when he asked rhetorically: " [U]nless the insurer's assertion as to justification is to be blindly accepted, when are the mental impressions of the insurer's agents not at least a pivotal issue?"[31]

In cautioning that there exists no rule of *per se* waiver of the attorney-client privilege in insurance bad faith cases, the *Tackett* court ordered production on grounds of fairness. Because those grounds are not present here, the objection based upon attorney-client privilege is sustained.

Tackett also applied the "pivotal issue" standard to attorney mental impressions. Because State Farm affirmatively relied on a defense of "routine handling," the Court noted that the entire claims file was thereby implicated.[32] Tackett was thus able to show a "compelling" need for the remainder of the file: he needed to discover the full context of the insurer's handling of his claim to counter State Farm's assertions. The Court also noted the trial judge retains discretion in reviewing materials *in camera* under this standard.[33]

Unlike *Tackett*, Harford has not relied on an argument implicating the entire claims file, such as a "routine handling" defense.[34] Although the letters discuss the

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[31] *Soligo*, 1996 Del. Super. LEXIS 141, at *5.

[32] *See Tackett*, 653 A.2d at 263.

[33] *Id*.

[34] In *Clausen*, Judge Quillen noted that the insurer's defense of failure to follow policy procedures similarly failed to meet the "compelling need" standard. *See Clausen*, 730 A.2d at 143.

reasonableness of Harford's claims handling, a "compelling" need to discover the correspondence between Harford and Heckler must rest on more than the making of the bad faith claim. As Judge Quillen noted in *Clausen*, the Supreme Court in *Tackett* ordered the production of documents based on a combination of State Farm's defense and the nature of the action.[35] Because Harford has not tendered a defense that implicates the entire claims file or the advice of counsel, Thomas cannot show a "compelling" need for the documents. The Harford-Heckler correspondence is protected under the work-product doctrine.

III. CONCLUSION

Accordingly, Thomas's Motion to Compel Disclosure is ***DENIED*** and the Commissioner's order to the contrary is ***VACATED***.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely

President Judge

ds
oc Prothonotary
xc Counsel

[35] *Id.*