American National Property and Casualty Company v. Stutte et al Doc. 43

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, *Plaintiff, Counter-Defendant* **v.** **CAROL ANN STUTTE, et al.** *Defendants, Counter-Plaintiffs*.	)	**CIVIL ACTION NO. 3:11-CV-219**

THE STUTTES' MEMORANDUM IN OPPOSITION TO ANPAC'S MOTION FOR STAY ON DISCOVERY RELATING TO EXTRA-CONTRACTUAL CLAIMS, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER

Defendants and Counter-Plaintiffs, Carol Ann Stutte and Laura Jean Stutte (collectively, the "Stuttes"), by and through counsel, submit this Memorandum in Opposition to Plaintiff and Counter-Defendant American National Property and Casualty Company's ("ANPAC's") Motion for Stay on Discovery Relating to Extra-Contractual Claims, or in the Alternative, Motion for Protective Order. For the reasons stated herein, ANPAC's motion for a stay or protective order should be DENIED.

BACKGROUND AND PROCEDURAL HISTORY

ANPAC's Denial of Coverage

On September 4, 2010, the Stuttes' home in Vonore, Tennessee and its contents were completely destroyed by fire. The Stuttes' non-attached garage was vandalized on that same date, with the word "queers" spray-painted on the side. The Stuttes promptly submitted a claim for their loss to ANPAC, their homeowners insurer. ANPAC denied the Stuttes' claim by letter

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dated May 12, 2011, and the next day filed the present lawsuit against the Stuttes. Compl. ¶ 5 (May 13, 2011) (Dkt. No. 1); Rule 56(d) Decl. of Scott J. Levitt ¶ 1 (Nov. 15, 2011) (Dkt. No. 31). In its denial letter and complaint, ANPAC accused the Stuttes of setting fire to their home and committing insurance fraud, but its letter and complaint did not set forth *any* facts in support of these grave allegations. Compl. ¶ 6; Levitt Decl. ¶ 1.

The Stuttes filed counterclaims for breach of contract, declaratory judgment, violation of the Tennessee Consumer Protection Act ("TCPA"), and statutory bad faith. The Stuttes alleged, among other things, that ANPAC acted in bad faith and violated the TCPA by denying coverage even though ANPAC knew the Stuttes could not possibly have set fire to their home because they were physically present in Nashville, Tennessee – approximately 200 miles away – at the time of the fire. Am. Countercl. ¶¶ 12, 36, 42 (Aug. 10, 2011) (Dkt. No. 20).

<u>ANPAC's Premature Motion for Summary Judgment</u>

On October 25, 2011, before *any* discovery had taken place, ANPAC filed a motion for summary judgment on the Stuttes' bad faith and TCPA claims. (Dkt. Nos. 27-29.) ANPAC's motion and supporting memorandum relied on two affidavits and fourteen exhibits, all of which fell wholly outside the pleadings. Levitt Decl. ¶ 6. In these materials, ANPAC made numerous factual allegations that the Stuttes vigorously dispute, and of most of which the Stuttes were previously unaware. *Id.*

The Stuttes filed an opposition memorandum and a Rule 56(d) declaration, noting that under Federal Rule of Civil Procedure 56(d) and well-settled Sixth Circuit precedent, summary judgment is improper where no discovery on the claims at issue has taken place. Stuttes' Mem. in Opp'n 6-12 (Nov. 15, 2011) (Dkt. No. 30) (attached as Ex. 1); Levitt Decl. ¶¶ 7-9 (attached as Ex. 2). ANPAC's reply asserted that the Stuttes should not be allowed to conduct *any* discovery

on their bad faith and TCPA claims before ANPAC's summary judgment motion is decided. ANPAC's Reply Mem. 1 (Nov. 23, 2011) (Dkt. No. 33).

After ANPAC's motion was fully briefed, the Stuttes uncovered new evidence that raises serious doubts about whether ANPAC acted diligently and in good faith when it investigated and ultimately denied the Stuttes' claim. This evidence includes: (1) cell phone records containing location data that place the Stuttes in Nashville at the time of the fire (which contradicts the conclusions of ANPAC's purported cellular reconstruction expert), and (2) an affidavit from a witness interviewed by ANPAC's primary investigator, Gary Noland, stating that Mr. Noland refused to consider documents, photos, and other pertinent information offered by the witness that supported the Stuttes' assertion that they were in Nashville before, during, and after the fire that destroyed their home. Stuttes' Supp'l Mem. 3-4 (Feb. 15, 2012) (Dkt. No. 36) (attached as Ex. 3). The Stuttes filed a supplemental opposition memorandum, which apprised the Court of this newly discovered evidence, argued that such evidence raises genuine issues of material fact that preclude summary judgment, and reiterated that the Stuttes must be given the opportunity under Rule 56(d) to seek discovery from ANPAC. *Id.* at 3-5.[1] The motions are pending.

ANPAC's Concealment of Relevant Evidence

On April 11, 2012, the Stuttes served ANPAC with their first set of discovery requests, which asked for ANPAC's claims file, as well as all other documents and information relating to ANPAC's investigation and evaluation of whether to accept or deny coverage for the Stuttes' insurance claim. On May 8, 2012, ANPAC produced around 100 documents and dozens of

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[1] On February 15, 2012, the Stuttes moved for leave to file a second amended counterclaim (Dkt. No. 37) to assert additional claims against ANPAC for negligent and intentional infliction of emotional distress, and to provide additional support for the Stuttes' existing counterclaims for bad faith and violation of the TCPA. That motion is pending.

photographs; however, ANPAC refused to divulge *any* documents or information that it contends "pertain[] to the extra-contractual claims" for bad faith and violation of the TCPA. ANPAC's Answers to Interrogs. 2 (May 8, 2012) (attached as Ex. 4); ANPAC's Resp. to Req. for Produc. of Docs. 2 (May 8, 2012) (attached as Ex. 5). In its motion for a protective order, ANPAC argues that it should be protected "from the discovery of information which is not relevant to the insurance coverage issue, but is instead aimed at fishing for evidence to support the extra-contractual claims." ANPAC's Mot. 2-3 (May 8, 2012) (Dkt. No. 41). ANPAC frames the "insurance coverage issue" as "whether or not the Stuttes committed fraud or caused or procured the burning of their own home." *Id.* at 4.

In addition, ANPAC refused to produce "documents or other tangible material generated by or on behalf of ANPAC after October 8, 2010" – one month after the fire, but seven months before ANPAC made its coverage determination – "because such information is protected from disclosure by the work-product doctrine and constitutes trial preparation material." ANPAC's Answers to Interrogs. 1; ANPAC's Resp. to Req. for Produc. of Docs. 1.[2] In its discovery responses, ANPAC contends that on October 8, 2010, its "cause and origin" expert reported to ANPAC that the fire and explosion were intentionally caused and that the Stuttes' neighbor was suspected. *Id.* at 1.

On May 8, 2012, ANPAC filed the present motion for a stay of discovery or protective order to prevent the Stuttes from obtaining evidence relevant to their bad faith and TCPA claims. *See* ANPAC's Mot. 1. ANPAC cited one reason to justify its motion: "If this Honorable Court

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[2] ANPAC raised other objections to the Stuttes' discovery requests. The Stuttes ask this Court to address only ANPAC's motion for a stay or protective order, and do not currently seek a ruling as to the sufficiency of ANPAC's discovery responses. Counsel for the Stuttes plan to meet and confer with ANPAC concerning its discovery responses, and will file a motion to compel if and when appropriate.

rules in favor of ANPAC on its pending motion for partial summary judgment, then there is no reason for the parties to waste resources conducting discovery relating to extra-contractual claims" for bad faith and violation of the TCPA. *Id.*

STANDARD OF REVIEW

Federal Rule of Civil Procedure 26(b) governs the scope of discovery and provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Rule 26(c) permits the Court, "for good cause" shown, to issue a protective order for the purpose of "protect[ing] a party . . . from annoyance, embarrassment, oppression, or undue burden or expense[.]" The movant has the burden of establishing "good cause," which "can only be met through a specific demonstration of fact . . . as opposed to stereotyped or conclusory statements." *D.B. v. Lafon*, No. 3:06-CV-75, 2007 WL 896135, at *2 (E.D. Tenn. Mar. 22, 2007) (citing 8A Charles Alan Wright et al., *Fed. Practice & Procedure* § 2035). This "determination must also include a consideration of the relative hardship to the nonmoving party should the protective order be granted." *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). If the protective order is denied, Rule 26(c)(2) authorizes the Court to issue an affirmative order compelling the discovery that was sought.

ARGUMENT

ANPAC's motion for a stay or protective order should be denied for several reasons. First, it seeks to draw an impossible line between evidence relevant to whether (a) the Stuttes committed arson and insurance fraud and (b) ANPAC committed bad faith or a violation of the TCPA in denying coverage on the grounds of arson and insurance fraud. Second, ANPAC's motion would violate well-established Sixth Circuit precedent that dictates that the Stuttes must be given an opportunity to conduct discovery before summary judgment may be entered against

them. Third, ANPAC's motion otherwise fails to establish "good cause" under Rule 26(c) because staying discovery as to the Stuttes' bad faith and TCPA claims will: (a) needlessly complicate discovery, creating additional disputes that will require court intervention and waste the parties' resources; and (b) highly prejudice the Stuttes. Finally, ANPAC's motion is part of an improper strategy to cherry-pick *only* evidence that supports its claims and defenses, conceal relevant evidence that might undermine its case, and then use a woefully incomplete and one-sided record to obtain a premature summary judgment *on the merits* of the Stuttes' claims. This Court should reject ANPAC's transparent attempt to manipulate the discovery process.

I. ANPAC Seeks to Withhold Key Evidence on the Question of Insurance Coverage.

ANPAC asserts in its motion that until its summary judgment motion seeking to dismiss the Stuttes' bad faith and TCPA claims is decided, discovery should proceed only as to the "real dispute: did the insureds commit fraud or are the insureds responsible for the fire or are they not?" ANPAC's Mot. 4. However, because it is ANPAC's burden to demonstrate the elements of arson or fraud as defenses to coverage,[3] the issue should properly be framed instead as: When all relevant evidence has been compiled, can ANPAC meet its legal burden of proving that the Stuttes burned down their own house or committed insurance fraud?

In its discovery responses, ANPAC asserts that it need only produce materials generated by or on its behalf before October 8, 2010, or documents in its possession prepared at any time by third parties. *See* ANPAC's Answers to Interrogs. 1; ANPAC's Resp. to Req. for Produc. of Docs. 1. In doing so, ANPAC is attempting to keep its post-October 8, 2010 investigation secret,

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[3] *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 211 (Tenn. Ct. App. 1991) ("To make out a defense of arson, a[n] [] insurance company must show by a preponderance of the evidence that the loss was due to a fire of incendiary origin, that the insured had an opportunity to set the fire, and that he had a motive to do so."); *Clift v. Fulton Fire Ins. Co.*, 315 S.W.2d 9, 12 (Tenn. Ct. App. 1958) (insurer has burden of proving defense that insured fraudulently submitted claim).

concealing the evidence that led it to believe the Stuttes committed arson and insurance fraud. (As of that date, ANPAC suspected the Stuttes' neighbor.) The Stuttes know at least some of ANPAC's ultimate conclusions, but not how it reached those conclusions, because in seeking summary judgment on the Stuttes' bad faith and TCPA claims, ANPAC selectively disclosed parts of its post-October 8, 2010 investigation, such as the final reports of its investigator, Gary Noland (Dkt. No. 27-2), and its cell phone records witness, Kevin Levy (Dkt No. 28-10).

There can be no tenable or logical dividing line between (a) evidence that is relevant to whether ANPAC can sustain its burden of proof that the Stuttes committed arson and insurance fraud, and (b) evidence that is relevant to whether ANPAC committed bad faith or a violation of the TCPA in determining the Stuttes committed such acts. Simply put, regardless of whether the Stuttes' bad faith and TCPA claims withstand ANPAC's summary judgment motion, the Stuttes are entitled to discovery of all evidence ANPAC considered in concluding that they committed arson and insurance fraud.

As but one example of how discovery of ANPAC's arson and fraud defense to coverage and the Stuttes' bad faith and TCPA claims are intertwined, ANPAC has refused to provide the contents of the investigation file of its investigator, Gary Noland, or ANPAC's communications with him. As per his affidavit submitted by ANPAC in connection with its summary judgment motion seeking to dismiss the Stuttes' bad faith and TCPA claims, Mr. Noland "assisted ANPAC with gathering information and interviewing witnesses," and he "regularly updated ANPAC with the information [he] gathered or learned from witnesses during his investigation work." Aff. of Gary Noland ¶¶ 4-5 (Sept. 30, 2011) (Dkt. No. 27-2). Mr. Noland's investigation is plainly relevant to the issue of whether ANPAC can sustain its burden of proof as to its claims of arson and fraud. Indeed, ANPAC specifically relies on Mr. Noland's affidavit in response to certain of

the Stuttes' interrogatories, including one asking ANPAC to "[s]tate all facts that You contend support Your decision to deny the Policyholder's claim under the Policy concerning the Loss." *See, e.g.*, ANPAC's Answers to Interrog. No. 2.

While Mr. Noland's affidavit submitted in support of ANPAC's motion for summary judgment refers to his interviews of 20 witnesses, he provides only a short description – some only a single sentence – of what each witnesses purportedly told him, and for some witnesses, he provides no information of what they told him. Without Mr. Noland's investigation file, the Stuttes cannot determine whether his affidavit accurately reflects the interviews he took or whether his investigation revealed anything that does not fit into ANPAC's narrative that the Stuttes committed arson and fraud. Indeed, the Stuttes know that Mr. Noland conducted an interview with Ms. Lora Lee Black lasting roughly 45 minutes in which she offered Mr. Noland various information, including documents and photographs establishing that she and the Stuttes were in Nashville before, during, and after the time of the fire, *see* Aff. of Lora Lee Black ¶¶ 5-13 (Feb. 14, 2012) (Dkt. No. 36-2), but Mr. Noland's affidavit includes only a cursory description of what Ms. Black purportedly told him, *see* Noland Aff. ¶¶ 26-28.

In order to defend against ANPAC's claim that the Stuttes are arsonists and insurance fraudsters, the Stuttes must have access to all of the evidence that ANPAC considered in its investigation. ANPAC's position is essentially: "We think you burned your house down and lied about it, but we're only going to disclose selected evidence that we think best supports our position. And we're not going to produce any other evidence that we collected in the seven months of investigation between the date we first suspected your neighbor and the date we denied your claim and then sued you, even if it undermines our case."

II. ANPAC's Motion Violates Well-Established Sixth Circuit Precedent that Summary Judgment Cannot be Granted on Factual Issues Until the Non-Movant is Afforded Discovery.

Under Rule 56(d) of the Federal Rules of Civil Procedure and Sixth Circuit precedent, summary judgment is improper where the non-movant has not received a full opportunity to conduct discovery on the claims at issue. ANPAC's motion for a stay or protective order asks the Court to violate well-settled authority by preventing the Stuttes from obtaining *any* discovery relevant to their bad faith and TCPA claims before the Court issues a summary judgment ruling *on the merits* of those very claims.

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only through discovery can it be determined whether a material factual issue exists which precludes summary judgment." *Vega v. First Fed. Savings & Loan Ass'n. of Detroit*, 622 F.2d 918, 926 (6th Cir. 1980). Therefore, "summary judgment should not [be] awarded until the [non-movant] [is] allowed some opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231 (6th Cir. 1994). Instead, where the non-movant demonstrates "by affidavit or declaration" that "it cannot present facts essential to justify its opposition, the court may . . . defer considering the motion or deny it." Fed. R. Civ. P. 56(d). If the court enters summary judgment "without permitting [the non-movant] to conduct any discovery at all," such a decision "will constitute an abuse of discretion." *Vance v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996); *accord CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008).

Contrary to ANPAC's assertion that this Court can adjudicate the Stuttes' bad faith and TCPA claims "as a matter of law" without discovery, these claims present questions of fact that cannot be resolved on summary judgment unless no genuine dispute of material fact exists. *See, e.g.*, *Morrison v. Allen*, 338 S.W.3d 417, 439 (Tenn. 2011) (whether insurer engaged in "unfair

or deceptive act[s] or practice[s]" in violation of TCPA is question of fact for the jury); *Doochin v. United States Fidel. & Guar. Co.*, 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993) (whether insurer's refusal to pay was in bad faith and warrants statutory penalty is question of fact for the jury).

In the Stuttes' pleadings in response to ANPAC's motion for summary judgment (all of which are incorporated as if fully set forth herein), the Stuttes established that genuine disputes of material fact exist in this case, and that they must be given the opportunity to seek discovery.[4] In its supporting memoranda, ANPAC failed to cite a single Tennessee case in which the court held, *before the insured was able to conduct discovery*, that an insurer was entitled to summary judgment on claims for bad faith or violation of the TCPA.

The two cases cited in ANPAC's recent motion for a stay or protective order are also inapposite. First, ANPAC cites an unpublished case from the Eastern District of Kentucky for the proposition that discovery should go forward only on coverage issues and not on the Stuttes' "extra-contractual" bad faith and TCPA claims. *See* ANPAC's Mot. 3-4 (discussing *Hardy Oil Co. v. Nationwide Agribusiness Ins. Co.*, No. 11-cv-75, 2011 WL 6056599 (E.D. Ky. Dec. 6, 2011)). However, in addition to requesting a "stay [of] discovery on [] bad faith," the insurer in *Hardy Oil* also moved "to bifurcate the trial . . . on [] bad faith . . . until after the coverage claim c[ould] be resolved." 2011 WL 6056599, at *1. The court in *Hardy Oil* stayed discovery on bad faith *only* because it had already decided to bifurcate the trial. *See id.* at *2.

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[4] For a more extensive discussion of the relevant case law and facts, see Stuttes' Mem. in Opp'n 5-12 (Dkt. No. 30) (attached as Ex. 1), Rule 56(d) Decl. of Scott J. Levitt ¶¶ 6-9 (Dkt. No. 31) (attached as Ex. 2), and Stuttes' Supplemental Mem. 3-5 (Dkt. No. 36) (attached as Ex. 3).

The present case could not be more different. ANPAC has not moved to bifurcate the trial of the Stuttes' bad faith and TCPA claims until after coverage is resolved. Rather, ANPAC has asked this Court to decide the bad faith and TCPA claims on summary judgment. At the same time, ANPAC seeks to prevent *any* discovery from commencing on the claims it wishes to be adjudicated first. ANPAC's contradictory position – no discovery until *later* for claims that should be decided on the merits *now* – finds no support in *Hardy Oil* and should be rejected.

Second, ANPAC cites a Sixth Circuit case for the proposition that a "party opposing a motion for summary judgment possesses no absolute right to *additional time* for discovery." ANPAC's Mot. 4 (emphasis added) (citing *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989)). However, the plaintiff in *Emmons* had the opportunity to conduct *some* discovery. 874 F.2d at 353, 357. Moreover, due to the nature of the plaintiff's allegations, his claims "hinged not upon information in [defendants'] control, but instead upon facts that, if they existed, should have been within [the plaintiff's] personal knowledge. His refusal to divulge his knowledge to the district court justified the early entry of summary judgment . . . ." *Id.* at 357.

Once again, the present case could not be more different. The Stuttes have not had the opportunity to conduct *any* discovery on their bad faith and TCPA claims, and until recently, had been provided with no discovery at all. Further, bad faith and TCPA claims – by their nature – focus primarily on the knowledge and state of mind of insurers, not on facts within the personal knowledge of insureds. *See, e.g.*, *Coppage v. Fireman's Fund Ins. Co.*, 379 F.2d 621, 623 (6th Cir. 1967) (finding bad faith where the insurer's "handling [of] a claim [] demonstrate[d] an indifference towards the interests of its insured and subordinate[d] the same to its own interests"); *Rothberg v. Cincinnati Ins. Co.*, No. 1:06-CV-111, 2008 WL 833201, at *8 (E.D. Tenn. Mar. 27, 2008) ("[w]hen an insurance company denies a claim based on information it

knows to be false, that supports a claim under the TCPA"). Because the key evidence relevant to the Stuttes' bad faith and TCPA claims is within ANPAC's exclusive possession and control, *Emmons* does not support ANPAC's request for a stay or protective order, and entry of summary judgment in the present suit would be premature. *See, e.g.*, *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977) ("where the facts are in possession of the moving party[,] a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course").

III. ANPAC's Motion Otherwise Fails to Establish Good Cause.

In addition to violating Sixth Circuit law, ANPAC's motion otherwise fails to meet its burden under Rule 26(c) of establishing "good cause" through a "specific demonstration of fact," because staying discovery on the Stuttes' bad faith and TCPA claims will needlessly complicate discovery and prejudice the Stuttes.

A. ANPAC's Motion is Conclusory and Unsupported.

The only reason ANPAC offers to support its motion is the conclusory assumption that "the parties [will] waste resources conducting discovery relating to extra-contractual claims" if the Court ends up granting ANPAC's pending motion for summary judgment. ANPAC's Mot. 2. This "is the type of conclusory statement which does not manifest good cause for a protective order." *Lafon*, 2007 WL 896135, at *2. ANPAC fails to explain why proceeding with routine discovery relevant to the Stuttes' claims constitutes an unnecessary burden. Instead, ANPAC's position is premised on the assumption that its motion for summary judgment will be granted. "The Court cannot accept this premise, however, as it assumes the very thing that [ANPAC] must prove." *Zurich Ins. Co. v. Health Sys. Integration, Inc.*, No. Civ. A. 97-4994, 1998 WL 211749, at *3 (E.D. Pa. Apr. 30, 1998). As several courts have held, "in both the summary judgment and motion to dismiss contexts, [] the existence of a pending case-dispositive motion,

without more, is usually insufficient to support a stay." *Abercrombie & Fitch Co. v. Fed. Ins. Co.*, No. 2:06-cv-831, 2010 WL 3910352, at *3 (S.D. Ohio Oct. 5, 2010); *accord Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990); *Health Sys. Integration*, 1998 WL 211749, at *3. Because it is contingent on a future outcome that is uncertain, ANPAC's purported "good cause" is illusory and cannot support ANPAC's request for a stay or protective order.

B. ANPAC's Motion Will Needlessly Complicate Discovery.

Not only is ANPAC's sole justification of preventing waste of resources conclusory and unsupported, it is also wrong. Contrary to ANPAC's position, a stay or protective order will actually complicate discovery, creating additional disputes that will require court intervention and waste the parties' resources. ANPAC appears to assume, without explanation, that it will be easy to distinguish between documents and information that are relevant to the "insurance coverage issue" and those that are relevant only to "extra-contractual claims." *See* ANPAC's Mot. 2-3. As noted above, it is impossible to draw a bright line between evidence that is relevant to the "insurance coverage issue" – *i.e.*, whether ANPAC's decision to deny coverage was correct – and evidence that is relevant only to bad faith and TCPA issues – *i.e.*, whether ANPAC's decision to deny coverage was made in good faith. ANPAC's investigation and decision-making process are relevant to both. The same facts, documents, and witnesses likely will be relevant to both aspects of this case.

As one court recently noted, "the issues with respect to coverage and bad faith, at least for discovery purposes, [are] intertwined such that bifurcation at the discovery stage would be inconvenient and needlessly complicated." *Blue Cross of Idaho Health Service, Inc. v. Atlantic Mut. Ins. Co.*, No. 1:09–CV–246, 2011 WL 162283, at *23 (D. Idaho Jan. 19, 2011). Indeed, "any dispute would require court intervention. The Court does not believe [the] use of its time, or the litigants' resources, would be best served by bifurcation at the discovery stage." *Id.*; *see*

also Williams v. Treasure Chest Casino, Nos. Civ. A. 95–3968, 97–0947, 1998 WL 42586, at *10 (E.D. La. Feb. 3, 1998) (denying motion to bifurcate discovery on coverage and bad faith because, if the insurer is unsuccessful on the coverage issues, "the Court will have to endure two separate, and potentially repetitive discovery processes"). For example, if ANPAC's motion for a protective order or stay is granted, the Court and/or the parties will have the impossible task of deciding what deposition questions regarding ANPAC's coverage investigation are relevant to coverage issues, and what questions are relevant only to bad faith and TCPA issues. Even if the Court and parties were able to draw such bright lines, if ANPAC's motion for summary judgment were later denied and the stay on extra-contractual discovery were lifted, then the parties would have to re-depose witnesses who were initially deposed while the stay was in effect.

Because ANPAC's motion will actually complicate discovery, and waste the Court's time and the parties' resources, ANPAC has failed to establish good cause in support of its motion.

C. ANPAC's Motion Will Prejudice the Stuttes.

Finally, the prejudice to the Stuttes of delaying (and potentially preventing) discovery on their bad faith and TCPA claims far outweighs any good cause ANPAC might be able to show. As noted above, whether ANPAC has grounds to deny coverage on the basis of arson or fraud is inextricably intertwined with the grounds for the Stuttes' bad faith and TCPA claims. Further, if ANPAC's premature summary judgment motion is granted, the Stuttes' bad faith and TCPA claims will be dismissed *with prejudice*. There could be no greater prejudice than for the Court to decide the claims at issue in this case without giving the Stuttes an adequate opportunity to defend themselves against ANPAC's baseless allegations and to support their affirmative claims for relief. If ANPAC's premature summary judgment motion is denied, the Stuttes would still be prejudiced by a temporary stay of discovery on their bad faith and TCPA claims. A stay would

prejudice the Stuttes by: (a) further delaying resolution of the Stuttes' insurance claim, which they timely noticed over 20 months ago; (b) forcing the Stuttes to prepare their case on coverage issues without a full record of ANPAC's coverage investigation; (c) forcing the Stuttes to endure separate, potentially repetitive discovery processes; and (d) "severely restrict[ing] the parties' ability to settle their dispute," *Treasure Chest Casino*, 1998 WL 42586, at *10.

Because the prejudice to the Stuttes would far outweigh any good cause that ANPAC might be able to show, this Court should deny ANPAC's motion for a stay or protective order.

IV. ANPAC's Motion is Part of a Strategy to Manipulate the Discovery Process.

ANPAC's invocation of the work-product doctrine further demonstrates that ANPAC is attempting to manipulate the discovery process to obtain an unjust result on the merits. As an additional reason for concealing relevant evidence, ANPAC has refused to release "documents or other tangible material generated by or on behalf of ANPAC after October 8, 2010 . . . because such information is protected from disclosure by the work-product doctrine and constitutes trial preparation material." ANPAC's Answers to Interrogs. 1; ANPAC's Resp. to Req. for Produc. of Docs. 1. According to ANPAC, its assertion of work-product protection is appropriate because on "October 8, 2010 [] Gary Young, [a] cause and origin expert, reported to ANPAC that the fire and explosion were intentionally caused and [the Stuttes'] neighbor was suspected." *Id.* Even if ANPAC reasonably anticipated litigation against the Stuttes' neighbor on October 8, 2010, its work-product claim is legally invalid and has been inconsistently applied.

Case law in the Sixth Circuit makes clear that ANPAC cannot invoke the work-product doctrine to shield its coverage investigation and evaluation from discovery. "Making coverage decisions is part of the ordinary business of insurance and if the 'driving force' behind the preparation of the[] [documents] was to assist [ANPAC] in deciding coverage, then they are not protected by the work-product doctrine." *In re Prof'ls. Direct Ins. Co.*, 578 F.3d 432, 439 (6th

Cir. 2009); *see also King v. CVS Pharmacy, Inc.*, No. 1:09-cv-209, 2010 WL 1643256, at *2 (E.D. Tenn. Apr. 21, 2010) ("insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate and make a decision with respect to the claims made on it by its insured") (quotation and citation omitted).

In *Professionals Direct*, the Sixth Circuit found that the insurer's attorneys "had dual functions. They were advising [] on the business decision of whether to deny coverage, and they were doing legal work in anticipation of litigation." 578 F.3d at 439. The district court examined the disputed documents *in camera*, and then ordered a number of documents produced, including "legal memoranda," "emails between [the insurer] and outside counsel concerning the coverage decision," and "correspondence between [the insurer's] employees . . . or between [the insurer] and its reinsurers regarding the coverage decision." *Id.* In *King*, this Court observed that "the burden is on the party claiming protection to show that anticipated litigation was the driving force behind the preparation of each requested document," and found that "[d]eciding whether the work product doctrine applies in the insurance context is a difficult, fact intensive task which requires an examination of the disputed documents." 2010 WL 1643256, at **2-3 (quotations omitted). This Court held that most of the documents at issue were not work product because they "were prepared by an insurance claims adjuster as part of the claims adjuster's file in the ordinary course of business, and that "if the driving force behind preparation of these documents was to assist [the insurer] in deciding coverage, then these documents were not protected by the work product doctrine, even if prepared by attorneys." *Id.* at *3.

In the present case, ANPAC had a duty to investigate, evaluate, and make a decision whether to pay the Stuttes' claim. ANPAC began adjusting the Stuttes' claim shortly after the

fire in September 2010, but ANPAC did not inform the Stuttes of its coverage determination until May 12, 2011. Thus, ANPAC continued in the ordinary course of business to investigate, evaluate, and decide whether to pay the Stuttes' claim long after October 8, 2010 – the date after which ANPAC claims work-product protection. The fact that ANPAC's outside counsel, Mr. Kinsman, may have played a role in ANPAC's investigation does not shield his documents from discovery, nor does it shield the documents of anyone else who assisted ANPAC with its claims investigation. *See Prof'ls. Direct*, 578 F.3d at 439; *King*, 2010 WL 1643256, at *3.

ANPAC's inconsistent use of the work product doctrine is blatantly self-serving. While ANPAC now claims that "documents or other tangible material generated by or on behalf of ANPAC after October 8, 2010" are protected as work product, ANPAC selectively disclosed with its summary judgment motion several reports generated by or on its behalf after that date, including a fire investigation report (dated Dec. 10, 2010) (Dkt. No. 28-2), a cell phone analysis report (dated May 3, 2011) (Dkt. No. 28-10), and a handwriting analysis report (dated June 6, 2011) (Dkt. No. 28-13). ANPAC insists that production of its complete claims file and other relevant documents is unnecessary because the evidence it has selected is sufficient to show that it had a good-faith basis to deny the Stuttes' claim. However, ANPAC's selective assertion of the work-product doctrine is yet another manifestation of its strategy to cherry-pick *only* evidence that supports its claims and defenses, and to ask this Court to enter a premature judgment *on the merits* based on an incomplete and one-sided record. ANPAC's manipulation of the discovery process prevents the Stuttes from learning through discovery whether, and to what extent, ANPAC failed to investigate or consider evidence that undermined or disproved its suspicion that the Stuttes set fire to their own home. Moreover, ANPAC's deliberate disclosure of some documents and reports generated after October 8, 2010 constitutes a waiver of work

product protection (if any) for those documents, and a waiver as to the entire subject matter, not simply those particular documents. *See, e.g.*, *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 306-07 (6th Cir. 2002) (declining to permit selective waiver of work product, noting that "waiver of the protections afforded by the work product doctrine is a tactical litigation decision" that cannot be "used as a sword rather than a shield"); *World Healthcare Sys., Inc. v. SSI Surgical Servs., Inc.*, No. 1:10-cv-00060, 2011 WL 3489669, at *4 (E.D. Tenn. Aug. 9, 2011) (holding that voluntary disclosure of work product necessitated the further disclosure of related protected information "in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary") (citations omitted).

Only after the Stuttes and this Court are permitted access to the full scope of ANPAC's coverage investigation will it be possible to decide whether ANPAC had a reasonable and good-faith basis to deny the Stuttes' claim on grounds of arson and insurance fraud. Moreover, with no work product protection (because they were not prepared solely for litigation against the Stuttes), or any such protection waived (by the intentional production of similar documents from the relevant time frame), the documents at issue should be useable in this action by the Stuttes. That these documents will presumably further help demolish ANPAC's baseless and defamatory allegations against the Stuttes does not take them outside the scope of relevant discovery, no matter how hard ANPAC tries to keep them from coming to light.

Conclusion

For the foregoing reasons, ANPAC's motion for a stay or a protective order should be DENIED.

Dated: May 22, 2012

Respectfully submitted,

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<u>**CERTIFICATE OF SERVICE**</u>

I certify that on this 22nd day of May, 2012, a copy of the foregoing **MEMORANDUM IN OPPOSITION TO ANPAC'S MOTION FOR STAY ON DISCOVERY RELATING TO EXTRA-CONTRACTUAL CLAIMS, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER** was filed electronically using the Court's Electronic Filing System. Notice of this filing will be served through the Electronic Filing System to parties or counsel who are Filing Users, and by first-class mail to any party or counsel who is not served through the Electronic Filing System.

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