No. 32777 - State of West Virginia ex. rel. Erie Insurance Property & Casualty Company v. The Honorable James P. Mazzone, Judge of the Circuit Court of Ohio County and Elizabeth Murfitt

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OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding, the petitioner sought a writ of prohibition to preclude the trial court from enforcing its order requiring the disclosure of insurance reserve information. The petitioner argued that the insurance reserve information was protected from disclosure by the work product doctrine. The majority opinion granted the writ, but for reasons different than that argued by the petitioner. The majority opinion determined that the writ should be issued for the purpose of requiring the trial court to make a determination of whether the insurance reserve information was relevant or reasonably calculated to lead to the discovery of admissible evidence. I concur in the grounds selected by the majority opinion to grant the writ. I have chosen to write separately to make clear that even if insurance reserve information is found to be relevant or reasonably calculated to lead to the discovery of admissible evidence, it may still be found to be undiscoverable under the work product doctrine or the attorney-client privilege.[1] Both issues, in the context presented, are

[1]*See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283, 288 (D.D.C. 1986) ("Where the reserves have been established based on legal input, the results and the supporting papers most likely will be work product and may also reflect attorney-client privilege communications."); *Guaranty Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. Civ. A. 90-2695, 1992 WL 78387, *2 (E.D. La. Apr. 2, 1992)

of matters first impression for this Court.

A. Reserve Information and the Work Product Rule

There are two types of work product set out under Rule 26(b)(3) of the West Virginia Rules of Civil Procedure: factual and opinion.[2] Under Rule 26(b)(3), factual work product refers to documents and tangible things that were prepared in anticipation of litigation or for trial (1) by or for a party, or (2) by or for that party's representative, which includes an attorney, consultant, surety, indemnitor, insurer, or agent.[3] When "'factual' work product is involved, the party demanding production must show a 'substantial need' for the

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("[W]hile courts have held that reserve information is relevant in coverage cases, courts have considered whether the reserve information sought was subject to any work product or attorney-client privilege.").

[2]Rule 26(b)(3) states:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) 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 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]Our Rule 26(b)(3) is patterned after, and is identical to, federal Rule 26(b)(3).

material and establish that the same material or its equivalent cannot be obtained through other means without 'undue hardship.'" Franklin D. Cleckley, Robin J. Davis and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26(b)(3), at 557 (2000). Opinion work product consists of mental impressions, conclusions, opinions or legal theories that are contained in factual work product. "Where opinion work product is involved, the showing required to obtain discovery is stronger than that for factual work product, because the rule states that 'the court shall protect against disclosure of mental impressions, conclusions, opinions or legal theories.'" *Id*. Opinion work product "enjoys a nearly absolute immunity and can be discovered in only very rare and extraordinary circumstances." *Id*., at 557-58.[4] The cases discussing requests to produce reserve information do so in the context of the opinion work product doctrine.[5]

There are two leading cases addressing the issue of the application of the opinion work product doctrine to reserve information. The two cases have reached different conclusions. For the sake of analysis, I refer to the two cases as the *Simon* view and the

[4]It has been further indicated that the "unwillingness [of courts] to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations . . . where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions. Absent such a compelling showing, the attorney's opinion work product should remain immune from discovery." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977).

[5]In the instant proceeding, the petitioner alleged that the opinion work product doctrine applied.

Rhone-Poulenc view.

1. Simon view. *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987), *cert. denied*, 484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987), sets out principles for application of the opinion work product doctrine to reserve information. *Simon* was a products liability case that was reviewed by the Eighth Circuit Court of Appeals on two certified questions. One of the issues in the certified questions concerned whether the opinion work product doctrine barred discovery of risk management documents compiled by nonlawyers, but which contained "aggregate" reserve information that was derived from "individual" reserve information that was determined by lawyers. The Court of Appeals examined this issue in three parts.

First, the decision held that the risk management documents, themselves, were not prepared in anticipation of litigation, and were, therefore, not protected from disclosure by the opinion work product doctrine. Next, *Simon* addressed in the abstract the issue of the individual reserve information commingled with risk management documents as follows:

> Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by Searle's attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.

Simon, 816 F.2d at 401. Finally, *Simon* indicated the following with respect to the aggregate reserve information that was derived from individual reserve information:

> We do not believe, however, that the aggregate reserve information reveals the individual case reserve figures to a degree that brings the aggregates within the protection of the work product doctrine. The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries. The purpose of the work product doctrine--that of preventing discovery of a lawyer's mental impressions--is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at best, such an indirect and diluted manner. Accordingly, we hold that the work product doctrine does not block discovery of [the] risk management documents or the aggregate case reserve information contained therein.

Simon, 816 F.2d at 401-02. *See also General Elec. Capital Corp. v. DIRECTV, Inc.*, 184 F.R.D. 32 (D. Conn. 1998) (relying on *Simon* to require reserve information be disclosed); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-C-2152, 1998 WL 2017926 (S.D. Fla. May 18, 1998) (same); *Athridge v. Aetna Cas. & Sur. Co.*, 184 F.R.D. 181 (D.D.C. 1998) (reserve information was not prepared in anticipation of litigation and therefore not protected by opinion work product rule); *In re Pfizer Inc. Secs. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125 (S.D. N.Y Dec. 23, 1993) (relying on *Simon* to require reserve information be disclosed); *Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 128 F.R.D. 608 (S.D.N.Y. 1989)

(reserve information was not prepared in anticipation of litigation and therefore not protected by opinion work product rule); *Cook v. Wake County Hosp. Sys., Inc*., 482 S.E.2d 546 (N.C. Ct. App. 1997) (relying on *Simon* to find risk management documents discoverable).

In sum, *Simon* stands for four propositions. First, risk management documents that are not prepared in anticipation of litigation are not protected by the opinion work product rule. Second, attorney generated individual reserve information is protected by the opinion work product rule. Third, risk management documents that are not prepared in anticipation of litigation, but which contain attorney generated individual reserve information, are protected by the opinion work product rule. Fourth, aggregate reserve information that is compiled by nonlawyers, but is derived from individual reserve information compiled by lawyers, is not protected by the opinion work product rule.

2. Rhone-Poulenc view. *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 139 F.R.D. 609 (E.D. Pa. 1991), established sightly different principles for the application of the opinion work product doctrine to reserve information. *Rhone-Poulenc* was an AIDS-related litigation brought by corporate policyholders against their insurers. One of the issues addressed in the opinion was a motion by the plaintiffs requesting information and documents concerning the reserves that the insurers had created for the underlying AIDS-related claims. In resolving this issue, the *Rhone-Poulenc* court addressed the issues of individual reserve information, aggregate reserve information, and risk management

documents.

With respect to individual reserve information *Rhone Poulenc* held succinctly that:

> The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation, and consequently, they are protected from discovery as opinion work-product.

Rhone-Poulenc, 139 F.R.D. at 614. Addressing the issue of aggregate reserve information derived from individual reserve information, *Rhone Poulenc* held:

> [T]he aggregate reserve figures may give some insight into the mental processes of the lawyers in setting specific case reserves. This is inevitable, considering that these aggregates and averages are based upon the attorney's evaluations of the value of specific claims. Notably, this is not a situation where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorney's initial evaluations of specific legal claims. Thus it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.

Rhone-Poulenc, 139 F.R.D. at 614-15. Finally, in resolving the issue of risk management documents, the decision in *Rhone Poulenc* addressed the issue in two ways:

> Although these risk management documents being sought by plaintiffs may not have in themselves been prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by defendants' attorneys. . . .

. . . .

> It can be argued, of course, that while this Court is protecting the mental impression/opinion work product concerning the attorney's evaluation of the reserve necessary for each lawsuit that I should not grant similar protection to any risk management department's opinion work-product concerning an aggregate reserve necessary for the underlying litigation. I find no basis in Rule 26(b)(3) for this distinction. Rule 26(b)(3) requires a court to "protect against disclosure of the mental impressions, conclusions opinions or legal theories of an attorney or other representative of a party concerning the litigation." Thus protective work product is not confined to information or materials gathered or assembled by a lawyer. Instead, it includes materials gathered by any consultant, surety, indemnitor, insurer, agent, or even the party itself. The only question is whether the mental impressions were documented, by either a lawyer or non-lawyer in anticipation of litigation.

Rhone-Poulenc, 139 F.R.D. at 614-15 (internal citations omitted). *See also Frank Betz Assocs., Inc. v. Jim Walter Homes, Inc.*, 226 F.R.D. 533 (D.S.C. 2005) (opinion work product rule protected disclosure of reserve information); *Boston Gas Co. v. Century Indem. Co.*, No. Civ. A. 02-12062-RWZ, 2005 WL 2150530 (D. Mass. Aug. 31, 2005) (same); *J.C. Assocs. v. Fidelity & Guar. Ins. Co.*, No. Civ. A. 01-2437 RJLJM, 2003 WL 1889015 (D.D.C. Apr. 15, 2003) (same); *Mordesovitch v. Westfield Ins. Co.*, 244 F. Supp. 2d 636 (S.D. W. Va. 2003) (same); *Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579 (S.D. W. Va. 2002) (same); *Certain Underwriters at Lloyds, London v. Fidelity & Cas. Ins. Co. of New York*, No. 89 C 876, 1998 WL 142409 (N.D. Ill. Mar. 24, 1998) (same); *Montgomery v. Aetna Plywood, Inc*., No. 95 C 3193, 1996 WL 189347 (N.D. Ill. Apr. 16, 1996) (citing to *Rhone-Poulenc* in finding valuation reports prepared by consultants protected by opinion work product

doctrine); *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283 (D.D.C. 1986) (opinion work product rule protected disclosure of reserve information); *Stevens v. Hartford Ins. Co. of the Midwest*, 646 So. 2d 981 (La. Ct. App. 1995) (opinion work product rule protected disclosure of reserve information); *PECO Energy Co. v. Insurance Co. of N. Am.*, 852 A.2d 1230 (Pa. Super. Ct. 2004) (relying on *Rhone-Poulenc* to find reserve information not discoverable).

In sum, *Rhone-Poulenc* stands for four propositions. First, individual reserve information involving input by an attorney is protected by the opinion work product rule. Second, aggregate reserve information that is compiled by nonlawyers, but is derived from individual reserve information compiled by lawyers, is protected by the opinion work product rule. Third, risk management documents that are not prepared in anticipation of litigation are protected by the opinion work product rule, to the extent they embody individual reserve information compiled by attorneys. Fourth, risk management documents that are prepared in anticipation of litigation are protected by the opinion work product rule, if compiled by attorneys or nonlawyers.

(3) Reconciling Simon and Rhone-Poulenc. *Simon* and *Rhone-Poulenc* are not completely at odds with each other. Both courts agree that individual reserve information involving input by an attorney is protected by the opinion work product rule. Further, both decisions agree that risk management documents that are not prepared in anticipation of

litigation are protected by the opinion work product rule, to the extent that they embody individual reserve information compiled by attorneys.[6] The opinions disagree, however, on the issue of aggregate reserve information that is compiled by nonlawyers, but is derived from individual reserve information compiled by lawyers. *Simon* takes the position that such information is not protected by the opinion work product rule; while *Rhone-Poulenc* takes the opposite view.

I believe that the positions taken by *Simon* and *Rhone-Poulenc*, on the issue of commingled aggregate reserve information, both have merit. To the extent that aggregate reserve information is not compiled in anticipation of specific litigation, but is merely done as a routine business practice, then *Simon* is correct in holding that the opinion work product rule does not shield the information. *See Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 536, 543 (N.D. W. Va. 2000) ("[It was] determined properly that these documents were not subject to the work product doctrine because they were notes 'taken as a routine

[6]The opinions also addressed slightly different issues involving risk management documents. *Rhone-Poulenc* found that risk management documents that *are prepared in anticipation of litigation* are protected by the opinion work product rule, if compiled by attorneys or nonlawyers. Whereas *Simon* held that risk management documents that *are not prepared in anticipation of litigation* are not protected by the opinion work product rule. *See Carlson v. Freightliner LLC*, 226 F.R.D. 343, 366 (D. Neb. 2004) ("Risk management documents prepared by investigators may not themselves be considered 'prepared in anticipation of litigation,' but to the extent that they disclose the individual case reserves for files and any mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim, they are privileged. Such documents are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.").

business practice.' A document created in the ordinary course of business is not created under the anticipation of litigation and, therefore, is not protected by the work product doctrine."). *See also St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 634 (N.D. Iowa 2000) ("'[C]ourts have routinely recognized that the investigation and evaluation of claims is part of the regular, ordinary, and principal business of insurance companies. Thus, even though litigation is pending or may eventually ensue does not cloak such routinely generated documents with work product protection.'" (quoting *Piatkowski v. Abdon Callais Offshore, L.L.C.*, No. Civ. A. 99-3759, 2000 WL 1145825 (E.D. La. Aug. 11, 2000))).

However, if the aggregate reserve information is compiled in anticipation of specific litigation, then the position taken by *Rhone-Poulenc* is correct. Such information is protected by the opinion work product rule. The reasoning, as was discussed in *Rhone-Poulenc* in context of the risk management documents, is that Rule 26(b)(3) expressly states that the opinion work product rule applies to "the mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative of a party* concerning the litigation." (Emphasis added). Rule 26(b)(3) states that examples of other representatives "includ[e] the party's attorney, consultant, surety, indemnitor, insurer, or agent[.]" *See J.C. Assocs. v. Fidelity & Guar. Ins. Co.*, No. Civ. A. 01-2437 RJLJM, 2003 WL 1889015, *2 (D.D.C.) ("[I]t would certainly seem that reserve calculations by claims adjusters qualify as work product under Fed. R. Civ. P. 26(b)(3). As that rule requires, they are prepared by the

insured's agent and their *raison d'etre* is the existence of litigation against the insured or its anticipation.").[7]

B. Reserve Information and the Attorney-Client Privilege

In the context of asserting the attorney-client privilege to protect disclosure of reserve information, sufficient evidence must be presented to show that attorneys were "included in the procedure of establishing reserves by preparing status reports or other supporting documentation for use by those employees responsible for setting reserves." Timothy M. Sukel and Mike F. Pipkin, *Discovery and Admissibility of Reserves*, 34 Tort &

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[7]Before leaving this area I note another issue related to reserve information that was not discussed in either *Simon* or *Rhone-Poulenc*. That issue concerns discovery of the methodology and analysis used to determine reserve information. The court in *In re Pfizer Inc. Securities Litigation*, No. 90 Civ. 1260 (SS), 1994 WL 263610, **1-2 (S.D.N.Y. June 6, 1994), confronted this issue and ruled as follows:

> . . . . Having reviewed the additional documents and the applicable law, we conclude that it is appropriate to treat the methodology and analysis that form the basis for the reserve figures in the same manner as the reserve figures themselves. Therefore, if a document sets forth the methodology for calculating the case reserve for an individual claimant, it is privileged as work product (and perhaps also as an attorney-client communication). This is because the methodology reflects an attorney's thoughts, conclusions, and mental impressions as to the value of a tort claimant's suit.
>
> However, if a document describes the methodology for determining an aggregate case reserve, it is not entitled to the protection of the work product or attorney-client privileges.

I would resolve the issue of discovery of the methodology and analysis used to determine individual and aggregate reserve information consistent with what I have indicated in the body of this concurring opinion.

Ins. L.J. 191, 208 (1998).[8] In syllabus point 3 of *State of West Virginia ex rel. Allstate Insurance Co. v. Madden*, 215 W. Va. 705, 601 S.E.2d 25 (2004), we held:

> In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential.

(Internal quotations and citations omitted).

Application of the attorney-client privilege to reserve information has been addressed by only one court in a meaningful manner. The decision in *Simon* addressed the issue narrowly in the context of whether risk management documents, containing aggregate reserve information derived from individual reserve information, were protected by the attorney-client privilege. *Simon* resolved the issue by stating:

> Assuming arguendo that the attorney-client privilege attaches to the individual case reserve figures communicated by the legal department to the risk management department, we do not believe the privilege in turn attaches to the risk management documents simply because they include aggregate information based on the individual case reserve figures. For the reasons that we have already stated in relation to the work product doctrine, we do not believe that the aggregate information discloses the privileged communications, which we are assuming the individual reserve figures represent, to a degree that makes the aggregate information privileged. The attorney-to-client communications reflected in the risk

[8]Here, the petitioner did not raise the issue of the attorney-client privilege protecting disclosure of the reserve information.

> management documents are therefore not protected by the attorney-client privilege.

Simon, 816 F.2d at 402-03. *See In re Pfizer Inc. Secs. Litig.*, 1993 WL 561125, *6 ("[T]he applicability of the [attorney-client] privilege to correspondence from attorney to corporate client depends on whether the subject matter was individual or aggregate case reserves. . . . [W]e believe that documents containing aggregate information are not 'predominantly concerned' with conveying legal advice, and are not therefore entitled to attorney-client privilege protection.").

I disagree with *Simon's* sweeping analysis. I believe that the issue of whether the attorney-client privilege attaches to aggregate reserve information depends upon the level of input by the attorney. If individual reserve information, prepared by an attorney for his/her client with the expectation of confidentiality, is not a substantial component of the aggregate reserve information, then the attorney-client privilege should not attach to the aggregate reserve information. On the other hand, the attorney-client privilege should attach to aggregate reserve information, if individual reserve information prepared by an attorney is a substantial component of the aggregate reserve information. The issue of *substantiality* requires a case-by-case determination.

The decision in *Simon* noted that it was not taking a position on "whether the attorney-client privilege in fact attaches to the individual case reserve figures, other than to

note that such a determination would require analysis of whether the individual reserve figures are based on confidential information provided by [the attorney]." *Simon*, 816 F.2d at 403 n.5. Other courts have addressed the issue without substantive discussion, and held that "documents containing individual case reserve figures are predominantly legal in nature. Therefore, those are [protected by the attorney-client] privilege[]." *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, *6. *See also Boston Gas Co. v. Century Indem. Co.*, 2005 WL 2150530 (attorney-client privilege protected disclosure of reserve information); *Coltec Indus., Inc. v. American Motorists Ins. Co.*, 197 F.R.D. 368 (N.D. Ill. 2000) (same); *Stevens v. Hartford Ins. Co. of the Midwest,* 646 So. 2d 981 (La. App. 1995) (same); *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. Civ. A. 89C-SE-35, 1995 WL 411805 (Del. Super. Ct. Mar. 17, 1995) (same); *Guaranty Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 1992 WL 78387, *2 ("[I]f reserve figures are based on information provided by an attorney, they . . . may be covered by the attorney-client privilege.")*; Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 117 F.R.D. 283 (D.D.C. 1986) (attorney-client privilege protected disclosure of reserve information). *But see Champion Int'l Corp. v. Liberty Mut. Ins. Co.*, 128 F.R.D. 608 (S.D.N.Y. 1989) (insurer failed to show attorney-client privilege applied to reserve information).

The above authorities make it clear that the attorney-client privilege attaches to individual reserve information when the elements of that privilege are established.

In view of the foregoing, I respectfully concur.