No. 30840 *State of West Virginia ex rel. Medical Assurance of West Virginia, Inc. v. The Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County; the Estate of Marjorie I. Verba, by Sally Jo Nolan, Executrix*

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OF WEST VIRGINIA

Starcher, C. J., concurring:

I agree with the general principles of law adopted by the majority opinion. I write separately to expound upon the general law in the area of the attorney-client privilege and work product doctrine when a party is seeking through discovery to examine an insurance company's claim file. I wish to make clear that, despite our ruling in favor of the insurance company in this case, our holding does not preclude the discovery of the vast majority of the information contained in the Medical Assurance claim file in this case.

Before discussing this law, I wish to note that the circuit court's interpretation of this Court's suggestion in footnote 8 of *Honaker v. Mahon*, 210 W.Va. 53, 62, 552 S.E.2d 788, 797 (2001) was laudable and well-intentioned, but stretched the language of the footnote somewhat farther than intended. In *Honaker*, the plaintiff was tied up in several years of litigation with her own insurance company over underinsured motorist coverage. Near the end of the trial, the attorney for the insurance company violated a pretrial order excluding certain evidence, a tactic the plaintiff argued was an attempt to "flush a losing case down the drain at plaintiff's expense." *Id.*

Our holding in footnote 8 was intended as a warning to insurance companies, and the attorneys representing those insurance companies, that *in first-party claims* the misconduct of the attorney retained on behalf of the insurance company is just as actionable as if it were done by a full-time employee of the insurance company. This warning does not, however, apply with equal force in third-party claims like that found in the instant case, because while the attorney might be paid by the insurance company, the attorney's first duty is to the client and not the insurance company.

A.

The Attorney-Client Privilege and Work-Product Privilege – Generally

The attorney-client privilege was stated in a widely quoted definition by Judge Wyzanski:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D.Mass. 1950). The attorney-client privilege applies only to attorney-client communications, and is "intended as a shield, not a sword." 8 Wigmore § 2327. The privilege may therefore be deemed waived

where the party asserting the privilege, in the course of litigation, raises an issue the effective rebuttal of which requires inquiry into privileged communications.

The work product rule is distinct from and broader than the attorney-client privilege. It extends to all documents and tangible things prepared by or for a client, the client's attorney, or their agents in anticipation of litigation or for trial, rather than merely protecting confidential communications between the attorney and his or her client. Rule 26(b)(3) of the *Rules of Civil Procedure* states that the work product doctrine provides qualified immunity for documents and tangible things. *Hickman v. Taylor*, 329 U.S. 495 (1947) extends the reach of the doctrine beyond documents and tangible things to "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." 329 U.S. at 511.

"The work product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest. . . . [T]he purpose of the privilege is to encourage effective legal representation *within the framework of the adversary system* by removing counsel's fears that his thoughts and information will be invaded by his adversary." *Jordan v. United States Department of Justice*, 591 F.2d 753, 775 (D.C.Cir. 1978)(*en banc*).

The attorney-client privilege belongs to the client alone; the work product immunity belongs to both the attorney and the client.

B.

Reasoning Courts Use to Find that the Attorney-Client Privilege is Waived as to Information Contained in an Insurance Claim File

1. *The insured-tortfeasor is a client of the attorney who may waive the privilege.*

It is axiomatic that the tortfeasor-insured – in this case, Dr. Ghaphery – would be a client of the defense attorney, entitled to examine any documents prepared by his own defense attorney. So, if the tortfeasor sued the insurance company to recover the excess verdict, the disputed documents to and from his own attorney would be discoverable, but that is not what happened in this case.

The general rule is that where two parties are represented by the same attorney for their mutual benefit, the communications between the parties are not privileged in a later action between those parties or their representatives. Hence, the tortfeasor-insured can sue his insurance company for an excess verdict and waive the attorney-client privilege as to materials created by his own attorney. *See, e.g., Chitty v. State Farm Mut. Auto. Ins. Co.,* 36 F.R.D. 37 (E.D.S.C. 1964) (tortfeasor-insured sued insurance company for bad faith after plaintiff recovered verdict $25,000.00 in excess of policy limits; trial court ordered production of entire claims file over objection of attorney-client privilege); *LaRocca v. State Farm Mut. Auto. Ins. Co.,* 47 F.R.D. 278 (W.D.Pa. 1969) (tortfeasor-insured sued insurance company for bad faith after plaintiff recovered excess verdict; court held where attorney acts for two parties, communications from either are not privileged from disclosure to the other, and ordered production of defense attorney's files); *Netzley v. Nationwide Mut. Ins. Co.,* 296 N.E.2d 550 (Ohio.App. 1971) (tortfeasor-insured sued insurance company for bad faith when

plaintiff recovered verdict $50,000.00 in excess of policy limits; defense attorney was assigned to represent the tortfeasor-insured by the insurance company, so the tortfeasor should therefore be allowed access to the defense attorney's files). *See also*, *Layton v. Liberty Mut. Ins. Co.*, 98 F.R.D. 457 (E.D.Pa. 1983) (plaintiff-passenger sued defendant insured driver for accident with an uninsured motorist; insurance company paid for insured's defense attorney; insured later sued the insurance company claiming bad faith failure to pay uninsured motorist benefits to insured; insured entitled to discovery of defense attorney's files).

Unfortunately for the plaintiff, Dr. Ghaphery has not – as of yet – chosen to waive the attorney-client privilege in this case.

2. *Waiver of the privilege by the injured plaintiff, Theory One*

If an injured plaintiff obtains an excess judgment against a tortfeasor, the plaintiff may then waive the tortfeasor's attorney-client privilege if the tortfeasor assigns his bad faith cause of action to the plaintiff. Once the tortfeasor-insured signs over his cause of action for bad faith to the plaintiff, the plaintiff formally stands in the shoes of the tortfeasor and can waive the tortfeasor's attorney-client privilege. *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850 (7th Cir. 1974) (tortfeasor assigned cause of action to plaintiff; plaintiff stood in tortfeasor's shoes and could waive any attorney-client privilege as to insurance company claim file); *Hartford Fire Ins. Co. v. Masternak*, 390 N.Y.S.2d 949 (App.Div.4th 1977)(*per curiam*) (plaintiff-daughter sued Mom and Dad after tripping down family stairs; Mom and Dad refused to claim attorney-client privilege, and insurance company sought to void

homeowner's liability policy for "lack of cooperation"); *Glacier General Assurance Co. v. Superior Court of Los Angeles Co.*, 95 Cal.App.3d 836, 157 Cal.Rptr. 435 (1979) (tortfeasor assigned excess judgment cause of action to plaintiff; plaintiff entitled to discovery of communications between tortfeasor's attorney and insurance company); *Catino v. Travelers Ins. Co. Inc.*, 136 F.R.D. 534 (D.Mass. 1991).

Again, such is not the scenario in this case.

3. *Waiver of the privilege by the injured plaintiff, Theory Two*

Several courts, the minority view, hold that the plaintiff is a third-party beneficiary of the insured-insurance company contract. Therefore, even without an assignment of a bad faith cause of action by the insured-tortfeasor, the plaintiff stands in the tortfeasor's shoes and can waive the attorney-client privilege in a bad faith action and obtain discovery of attorney-client materials in the claims file. *Boston Old Colony Ins. Co. v. Gutierrez*, 325 So.2d 416 (Fla.App.3d 1976); *Dunn v. National Sec. Fire & Cas. Co.*, 631 So.2d 1103 (Fla.App.5th 1993). Federal courts in two states applying state law reached the same conclusions. *Shapiro v. Allstate Ins. Co.*, 44 F.R.D. 429 (E.D.Pa. 1968) (third-party plaintiff stands in shoes of the tortfeasor and can waive attorney-client privilege to insurance company claim file); *Bourget v. Government Employees Ins. Co.*, 48 F.R.D. 29 (D.Conn. 1969) (same).

Nor is this view applicable to the facts of this case.

4. *The attorney-client privilege only attaches to attorney-client communications not the actions of the attorney*

The information in the claim file that was passed between the attorney and the insurance company must actually meet the definition of attorney-client privileged information. While this approach usually requires a careful analysis of the materials allegedly protected by the attorney-client privilege, the analysis can be bypassed if the party is asserting that *actions of the attorney* are privileged. For instance, if an attorney acts as a claims adjuster rather than an attorney, the documents generated by the attorney are not privileged. *See, e.g.*, *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160 (D.Minn. 1986) (insurance company's law firm hired as a matter of course to conduct investigation of any claims exceeding $25,000.00; law firm investigated plaintiff's claim and recommended claim be denied; because the attorney-client privilege would allow a "blanket obstruction to discovery of [the] claims investigation," to the extent the attorneys acted as claims adjusters their communications and work product would be discoverable by plaintiff in a bad faith action).

It is unclear if this occurred in this case.

5. *The attorney-client privilege is to be narrowly construed*

West Virginia law is clear that the attorney-client privilege is to be given a strict, narrow interpretation. "Privileged" material is only that material which contains confidential communications made to an attorney. Syllabus Point 7, *State ex rel. U.S.F. & G. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995). Hence, each line of each document can be evaluated to determine whether the document is actually discussing a privileged

communication between the client and the attorney. Then, the privileged material can be redacted. Normally discoverable facts cannot be hidden by the attorney-client privilege.

An example of strict construction is found in *Loftis v. Amica Mut. Ins. Co.*, 175 F.R.D. 5 (D.Conn. 1997), where the injured plaintiff recovered a verdict of $3.8 million, in excess of the tortfeasor's $300,000.00 policy. In a subsequent bad faith action against the insurance company, the plaintiff sought to discover a letter from the tort claim defense attorney to the insurance company. The court held that the letter to the insurance company contained the attorney's advice and opinions, and was certainly opinion work product. However, the letter failed to contain "confidences" of the client. Because the letter did not reveal any client confidences, the letter was not protected by the attorney-client privilege.

6. *Bad faith conduct by an insurance company constitutes civil fraud that waives the attorney-client privilege*

As Justice Davis more eloquently states in her separate opinion, some states hold that bad faith by an insurance company rises to a level of civil fraud; therefore, an insurance company may by its actions engage in civil fraud and waive the attorney-client privilege under the crime-fraud exception. *United Services Automobile Association v. Werley*, 526 P.2d 28 (Alaska 1974)(where plaintiff made *prima facie* showing of bad faith in first-party claim for uninsured motorist benefits, insurance company voided attorney-client privilege); *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982) (plaintiff in third-party claim entitled to discovery of defense attorney's files where defendants engaged in civil fraud to conceal evidence implicating deep-pocket defendants; plaintiff need only show "a foundation

in fact for the charge" of bad faith to show civil fraud and waiver of the attorney-client privilege); *Escalante v. Sentry Ins.*, 743 P.2d 832 (Wash.App. 1987) (follows *Caldwell*, requiring foundation in fact of bad faith to establish civil fraud and overcome claims of attorney-client privilege in first-party claim). *See also, In re Bergeson*, 112 F.R.D. 692 (D.Mont. 1986)(citing to *Caldwell* and *Werley* for proposition that claim file must be produced to first-party insured in bad faith action failure to pay fire insurance benefits, without discussing the crime-fraud exception) and *Silva v. Fire Insurance Exchange*, 112 F.R.D. 699 (D.Mont. 1986) (same, citing to *In re Bergeson*). *See generally*, David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C.L.Rev. 443 (1986).

C.

Reasoning Used to Overcome the Work Product Doctrine

1. *The disputed materials were not prepared in anticipation of litigation*

The first step in any work product analysis is to ask, "are the documents or tangible things work product?" Work product consists of materials produced in anticipation of litigation. There are numerous approaches used by courts to determine whether documents in insurance claims files are created in anticipation of litigation, generally summarized down to three approaches: never work product, always work product, or case-by-case analysis focused on the primary purpose behind the creation of the documents or tangible things.

Thomas Organ v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972) represents one extreme, holding that documents produced in the ordinary course of business are discoverable, such as the reports on adjusting claims that insurance companies produce on a daily basis. Hence, unless the documents are created by an attorney or at an attorney's direction, the documents in the insurance company claim file are never protected by work product. *See also, Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D.Ga. 1972) (court held that "the evaluation of claims of [an insurance company's] policyholders is the regular, ordinary and principal business of defendant insurance company. Most of such claims result in payment by the defendant; it can hardly be said that the evaluation of a routine claim from a policyholder is undertaken in anticipation of litigation . . . .")

Thomas Organ has been criticized because Rule 26(b)(3) specifically allows reports generated by "representatives" to be protected, if prepared in anticipation of litigation. The backlash case is *Almaguer v. Chicago, Rock Island & Pacific R.R. Co.*, 55 F.R.D. 147 (D.Neb. 1972), where the court held that "statements taken by a claim agent immediately after an accident are taken in anticipation of litigation . . . ." Hence, the court held that everything an insurance company does is protected by the work product doctrine.

Most courts use a case-by-case method, looking to when it appeared to the creator of the material that litigation was imminent. "While litigation often results from an insurance company's denial of a claim, it cannot be said that any document prepared by an insurance company after such a claim has arisen is prepared in anticipation of litigation . . . .

That is not to suggest that *all* documents prepared by an insurance company in investigating a claim, are, by definition, compiled in the ordinary course of business and, thus, automatically subject to discovery." *APL Corp. v. Aetna Cas. & Surety Co.*, 91 F.R.D. 10, 17-18 (D.Md. 1980).

The court in *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655 (S.D.Ind. 1991) set out a solid two-part test for determining whether documents are work product: reasonable anticipation, and causation. First, a prudent party anticipates litigation, but there must be more than a "remote prospect," "inchoate possibility," or "likely chance" of litigation. There must be a substantial and specific threat of litigation before a party's anticipation of litigation will be considered a reasonable and justifiable motivating force behind creating a document. 138 F.R.D. at 659-60. Second, the disputed document must have been produced because of the prospect of litigation and for no other purpose. "In anticipation" must not be read broadly; documents that would have been produced in the regular course of business are outside the scope of work product. *Id* at 660-61. Also, the work product doctrine does not depend solely on the fact that a document was produced after a certain point in time (such as the date the insurance company learned the plaintiff hired an attorney); routine reports are still not work product. *See also, Stout v. Illinois Farmers Ins. Co.*, 150 F.R.D. 594 (S.D.Ind. 1993) (holding that a document is work product only if its primary purpose for creation was for litigation).

Insurance companies routinely assert that investigative reports are prepared in anticipation of litigation. The fact that litigation ensues does not make a document in the

claims file "work product" prepared in anticipation of litigation. As one court stated in compelling the production of a claims file over a work product objection, "the investigation of potential claims is an integral part of the insurer's business. Investigations are made regularly and in the ordinary course of business. They are necessary if the companies are to make intelligent dispositions of claims. They are necessary also if a carrier is to perform adequately the duties and obligations towards its insureds which are imposed upon it by law." *Henry Enterprises, Inc. v. Smith*, 592 P.2d 915, 921 (Kan. 1979).

Incidentally, merely because documents are created by a lawyer does not make the documents protected by the work product doctrine. In *Western Nat. Bank of Denver v. Employers Ins. of Wausau*, 109 F.R.D. 55 (D.Colo. 1985), the insurance company hired a law firm to conduct a factual investigation of misconduct by the insured-bank's employees. The trial court held that the law firm did not generate work product, but rather generated ordinary insurance investigative claim files prepared in the course of business. Hence, the plaintiff-bank was entitled to discover the law firm's files in a bad faith claim against the insurance company. *See also, Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160 (D.Minn. 1986) (insurance company hired law firm as matter of course to direct investigation of any claim with loss exceeding $25,000.00; to the extent the law firm acted as claims adjusters, their work product would be treated as created in the ordinary business of the insurance company, outside the attorney-client and work product privileges).

Some variation of this middle approach is followed by most courts, and is more defensible than the other two extremes.

2. *"Substantial need" for the work product and an inability "without undue hardship to obtain the substantial equivalent of the materials by other means."*

As the majority opinion finds, work product is discoverable upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.

A minority of courts hold that the materials in an insurance company claim file are protected by the work product doctrine, and cannot be discovered. *See Ex parte Bozeman*, 420 So.2d 89 (Ala. 1982) (plaintiff did not show substantial need by asserting the claims file documents were needed for impeachment of insurance adjuster); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D.Ga. 1982) (plaintiff did not show undue hardship in obtaining the substantial equivalent of the claims file, because the plaintiff could depose insurance company employees about their actions and opinions); *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653 (M.D.N.C. 1995) (Rule 11 requires a plaintiff to have a basis in fact for making an allegation; therefore, plaintiff should not need claims file to make a bad faith allegation; besides, adjusters could be deposed to learn the facts, so no need or undue burden shown for work product); *Dixie Mill Supply Co., Inc. v. Continental Casualty Co.*, 168 F.R.D. 554 (E.D.La. 1996) (follows *Ring*).

The majority view held by courts generally follows *Brown v. Superior Court In and For Maricopa County*, 670 P.2d 725 (Ariz. 1983), a first party bad faith case arising from the insurance company's refusal to pay business interruption benefits after the

plaintiff's business burned. The court held that the question in a bad faith claim is whether the insurance carrier acted reasonably, and

> . . . the substantial equivalent of [the claims file] material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether [the insurance company] acted reasonably.

The Court held that the "strategy, theories, mental impressions and opinions of Continental's agents . . . are directly at issue." Therefore, any work product material pertaining to the opinions of the claims agents was discoverable.

Similarly, in *Reavis v. Metropolitan Property & Liability Ins. Co.*, 117 F.R.D. 160 (S.D.Cal. 1987), the insurance company objected to production of the claims file alleging certain materials were work product. The court stated that the "tort of bad faith goes to the reasonableness of Metropolitan's handling of Reavis' claim. It is apparent that the claims files contain a detailed history of how Metropolitan processed and considered Reavis' claim; under these circumstances, the documents are certainly relevant to the issues raised . . . ." 117 F.R.D. at 164. The court did hold that opinion or mental work product is afforded greater protection, but such protection should not be absolute. The adjusters for the insurance company "will probably testify at trial concerning the steps they took and the conclusions and opinions they had regarding Reavis' claim. In order to effectively cross-examine these witnesses, Reavis will need to know upon what facts the conclusions were based. The documents reflected in the claims file will give Reavis this information." *Id.* at 164-65. *See also, Hartman v. Banks*, 164 F.R.D. 167 (E.D.Pa. 1995) (third-party claim;

insurance company objected to producing file on grounds of work product; when compelled, in a "display of considerable chutzpah" company produced documents with entire contents redacted; court ruled unredacted documents should be produced, stating "The [claims] file kept by Nationwide may well contain crucial evidence on the central issues in the case – the state of mind and behavior of Nationwide officials."). *See also*, Thomas E. Workman, *Plaintiff's Right to the Claim File, Other Claim Files and Related Information: The Ticket to the Gold Mine*, 24 Tort & Ins. L.J. 137 (1988); Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 Iowa L.Rev. 1277 (1981); Woodward, *Insurance Companies and Work Product Immunity Under Indiana Trial Rule 26(b)(3): Indiana Adopts a Fact-Sensitive Approach*, 19 Ind.L.Rev. 139 (1986); 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 (1997); Jeff A. Anderson, *et al.*, *The Work Product Doctrine*, 68 Cornell L.Rev. 760 (1983); Kevin M. LaCroix, *The Work Product Doctrine and Claim File Discovery: The Insurer's Perspective*, Inside Litigation 24 (March 1992); Randy S. Parlee, *Accessing Insurance Company Claim Files*, 65 Wisconsin Lawyer 10 (September 1992).

On remand, as to any work product contained in the Medical Assurance claim file, the circuit court should consider whether the plaintiff has shown a substantial need for information sought that is allegedly protected by the work-product privilege, and if so whether the plaintiff is unable without undue hardship to obtain the substantial equivalent of the information by other means.

The plaintiff is attempting to show that Medical Assurance's decision to deny the plaintiff's request to settle within policy limits was unreasonable, and the record suggests that the documents in the Medical Assurance claim file are the only contemporaneous record of Medical Assurance's decision process. The necessity for the claim file documents therefore appears to be substantial. However, whether these documents could be obtained from another source without undue hardship is not clear from the record, and should be resolved by the circuit court.

I otherwise respectfully concur with the majority's decision.