IP 03- 361-C B/K IMI v Ohio Casulty [2]
Magistrate Tim A. Baker Signed on 12/28/07

NOT INTENDED FOR PUBLICATION IN PRINT

IRVING MATERIALS, INC.,	)	
	)	
Plaintiff,	)	
	)	1:03-cv-361- SEB-TAB
vs.	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY, AMERICAN NATIONAL FIRE INSURANCE COMPANY, and THE OHIO CASUALTY INSURANCE COMPANY,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IRVING MATERIALS, INC.,	)	
	)	
Plaintiff,	)	
	)	1:03-cv-361- SEB-TAB
vs.	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY, AMERICAN NATIONAL FIRE INSURANCE COMPANY, and THE OHIO CASUALTY INSURANCE COMPANY,	)	
	)	
Defendants.		

ORDER ON MOTION TO QUASH SUBPOENA AND REQUEST FOR PROTECTIVE ORDER

I. Introduction.

The issues before the Court are whether Plaintiff Irving Materials, Inc. ("IMI") can depose Ginny L. Peterson, an attorney of record for Defendants American National Fire Insurance Company and The Ohio Casualty Insurance Company (collectively "Ohio Casualty"), and whether Peterson can be compelled to produce documents identified in IMI's deposition notice and subpoena duces tecum. Ohio Casualty filed a motion to quash subpoena and request for protective order [Docket No. 603] seeking to preclude Peterson's deposition after IMI subpoenaed her.

IMI, a supplier of ready-mix concrete, was sued by hundreds of its customers in and around Madisonville, Kentucky, who alleged that concrete they had purchased from IMI is

defective, resulting in property damage and posing risks such as structural damage and physical injury. Plaintiff unsuccessfully filed claims for indemnity and defense with several of its insurers, and filed this suit against the insurers in 2003 for bad faith, breach of contract, waiver, and estoppel. IMI has an excess or umbrella insurance policy with Ohio Casualty, its primary policy being with Zurich American Insurance Company.

On May 29, 2007, Ohio Casualty filed a motion for summary judgment [Docket No. 577] asserting that its policy had not yet been triggered because the underlying insurance had not yet been exhausted, a hotly contested issue that has not yet been determined. As of May 29, 2007, Ohio Casualty had paid IMI $2,214,840.64 in indemnity payments on an interim or pre-funding basis with respect to the third-party claims asserted against IMI. Attorney Peterson was hired by Ohio Casualty to evaluate the third-party claims for purposes of the pre-funding arrangement with IMI. IMI now seeks to depose Peterson in her alleged capacity as a claims adjuster on the case.

II. Discussion.

A. The parties' positions.

Ohio Casualty argues that IMI should not be allowed to depose and require production of documents from Peterson because doing so would invade the attorney-client privilege and work product doctrines and IMI "has not clearly articulated any need for this extraordinary discovery from counsel." [Docket No. 604 at 1.] Acknowledging that an attorney can act as a claims adjustor, [Docket No. 604 at 16 (citing *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991)], Ohio Casualty claims that when Peterson reviewed and evaluated information and documentation submitted by IMI, she did so to render legal advice regarding the

implementation of an informal funding arrangement, arguing that no claims have even been adjusted by Ohio Casualty. Ohio Casualty says it "retained Peterson as counsel of record in October 2003 to represent it in the defense of the lawsuit filed by IMI" as reflected by the docket. [Docket No. 604 at 19.] Likewise, Ohio Casualty contends that all of Peterson's documents sought by IMI are related to the coverage litigation because this whole case is about coverage and there is no way to distinguish between coverage and non-coverage issues. Finally, Ohio Casualty asserts that if Peterson provides the requested deposition and documents, she will either be forced to violate Indiana Rule of Professional Conduct 3.7 or withdraw from the case, and that withdrawal would prejudice Ohio Casualty. Ohio Casualty concludes in its motion: "IMI has come forward with no rational reason why its supposed discovery needs outweigh the attorney-client and work product privileges belonging to Ohio Casualty." [Docket No. 604 at 27.]

In its response, IMI first argues that the burden is not on IMI to "come forward" with reasons why Peterson's deposition is necessary since Ohio Casualty is requesting the protective order. IMI claims it seeks Peterson's deposition because Peterson has been acting as the claims adjustor in the case, and thus requests information from her in that capacity. It notes that Ohio Casualty claims examiner Joseph Snider "has responsibility for the file on a day-to-day basis" and is the decision-maker on the case, but alleges that Snider "testified that he retained Ms. Peterson and her office to help handle and adjust the claims because of the high volume of claims at issue." [Docket No. 617 at 8.] IMI asserts it needs Peterson's deposition because Peterson made the decision when to recommend underlying claims to Ohio Casualty for review and payment; her role as such explains the considerable lag in time between when claims were

filed and when they were decided; Snider was unable to provide information on the claims that he was supposedly handling (even regarding two of them that had been paid right before his deposition); according to Snider, Peterson calculates what portion of claims are to be paid by Ohio Casualty; the main claims folder for this case is housed at Peterson's office as supported by the fact that production of documents came from Peterson's office; and Ohio Casualty had repeatedly asked IMI for information that Peterson already had.

IMI further maintains that not all of Peterson's documents are protected by the work product doctrine, and that even if so, the work product doctrine should not apply because IMI has a substantial need for the information, which it cannot obtain from anywhere else. It contends the deposition of Peterson should be allowed because her knowledge is central to the dispute on the issues of bad faith, breach of contract, waiver, and estoppel. Furthermore, IMI contends that Ohio Casualty failed to separate its coverage file from its litigation file, and is now asking that the Court remedy this situation by asking for the broad protective order. IMI argues that Peterson's work and communications regarding legal advice and claims-handling can be separated.

Ohio Casualty replies that IMI's characterization of Peterson's role is misleading. It says that Ohio Casualty has not handled or adjusted any underlying third-party property damage claims, maintaining that IMI has not proven exhaustion of the primary liability insurance coverage. Ohio Casualty says that it volunteered payments through an interim pre-funding arrangement, and for this purpose Peterson organized, evaluated, and presented information to Ohio Casualty with respect to third-party claims. Ohio Casualty points out that this Court noted that this pre-payment was "in the nature of an informal settlement," [Docket No. 555 at 29], and

says that Peterson's evaluations and calculations performed regarding this interim pre-funding arrangement should not be characterized as claims adjustment. Thus, it argues, IMI's grounds for deposing Peterson are based upon false and misleading premises.

IMI filed supplemental evidence countering Ohio Casualty's claim that it did not adjust third-party claims, citing a deposition statement given by Ohio Casualty's representative David Hanna. Upon being asked whether Ohio Casualty is adjusting any claims related to IMI's problems in Madisonville, Kentucky, he answered: "Ohio Casualty has been involved in IMI in the litigation and has paid IMI $2 million, so I'd say yes, they have made adjustments on the IMI claims." [Docket No. 640, Ex. A at 4 (Hanna Dep. at 256-57).] Furthermore, in response to Ohio Casualty's assertion that its payments to IMI should be characterized as a settlement, IMI submitted a series of letters indicating that Ohio Casualty's payments to IMI were made with full reservation of Ohio Casualty's rights to contest any obligation to make payments under the policy. [Docket No. 640, Ex. C.] Accordingly, IMI believes it is entitled to depose Peterson regarding her work on the underlying claims on the basis that such work is not legal advice and thus not privileged.

B. The attorney-client privilege.

Ohio Casualty argues that the attorney-client privilege allows Peterson to decline the deposition and production of documents because she does not qualify as a fact witness, having only served as an attorney for Defendants. While the attorney-client privilege clearly pertains to a great deal of the communications between Peterson and Ohio Casualty, it does not provide a complete blanket of protection for all of their communications.

"The attorney-client privilege is one of the oldest recognized privileges for confidential

communications." *Gast v. Hall*, 858 N.E.2d 154, 163 (Ind. Ct. App. 2006) (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). The attorney-client privilege protects against judicially compelled disclosure of confidential information and "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Lahr v. State*, 731 N.E.2d 479, 482 (Ind. Ct. App. 2000) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Not every communication between an attorney and client is considered confidential. *Id*.

In diversity matters, federal courts "look to state law, not federal law, in determining the existence and scope of the attorney-client privilege." *Bartlett v. State Farm Mut. Auto Ins. Co.*, 206 F.R.D. 623, 626 (S.D. Ind. 2002); *see also* Fed. Rule Evid. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.") According to Indiana Code § 34-46-3-1: "Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases." The burden of proof is on the party asserting the privilege to prove the applicability of it, and the applicability must be established "as to each question asked or document sought." *Airgas Mid-America, Inc. v. Long*, 812 N.E.2d 842, 845 (Ind. Ct. App. 2004) (quoting *Owens v. Best Beers*, 648 N.E.2d 699, 702 (Ind. Ct. App. 1995)) (reversing the trial court because it granted a blanket privilege to the requesting party rather than determining on an

item specific basis); *see also Howard v. Dravet*, 813 N.E.2d 1217 (Ind. Ct. App. 2004) (same).

In the context of an insurance case, the Indiana Court of Appeals provides some indication of what might be considered legal advice, and thus privileged, and what would not be legal advice, and thus not privileged. It distinguishes an attorney providing consultation services to an insurance company prior to the time the insurer has accepted obligations under the policy to aid in that determination, from an attorney retained to act in the capacity of an "outside claims adjuster" or someone giving simple business advice. *Hartford Fin. Servs. Group v. Lake County Park & Rec. Bd.*, 717 N.E.2d 1232, 1236 (Ind. Ct. App. 1999) (citing *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986)).

The deposition of Joseph Snider, the claims examiner from Ohio Casualty, supports the proposition that Peterson played a role in claims adjustment-like activities. Snider stated at his deposition that information sent by IMI to Ohio Casualty was given to Peterson who "would sort it out, go through it and supply [Snider with] a packet on each file when it was ready to be paid." [Docket No. 618, Ex. C, Part 4 at 12 (Snider Dep. at 260).] In answering whether it is customary for Ohio Casualty to use outside counsel as claims adjusting service,[1] he said that it was not customary and that the reason it was done in this case was "[b]ecause of the volume." [*Id.* (Snider Dep. at 259-60).] This testimony supports the argument that Peterson was involved in the claims adjustment-like process, at least to some extent.

Even so, Ohio Casualty claims that Peterson's analysis of the claims has nothing to do with adjustment and only has to do with coverage. This claim is inconsistent with Ohio

[1] Ohio Casualty's counsel objected to the form of this question. The question stated: "Is it customary for you to use outside counsel as claims adjusting service?" [Docket No. 618, Ex. C, Part 4 at 12 (Snider Dep. at 259).] This objection is overruled.

Casualty's position that it need not pay anything at all at this time because IMI's primary policy has not yet been exhausted. If Peterson's analysis of the claims dealt only with coverage, to be consistent with Ohio Casualty's position she would have concluded that nothing should be paid out on any of the claims. In fact, in anticipation that it might need to pay or partially pay on the claims under the policy, Ohio Casualty has proceeded to calculate what it might owe, or a portion of what it might owe, and has begun to pay that portion to the third-party claimants on behalf of IMI. Assuming Ohio Casualty's position that the primary policy has not yet been exhausted, this work conducted by Peterson at least amounts to hypothetical claims adjustment. Considering the issue of exhaustion is yet unresolved, it cannot be assumed for discovery purposes that this claims adjustment behavior is even hypothetical. Certainly, this work by Peterson—analyzing the third-party claims and determining specific amounts to be paid out to these claimants—cannot be presumed to be legal advice to Ohio Casualty on the issue of coverage.

Giving blanket privilege is disfavored; rather, the party requesting the privilege has the burden to establish privilege on an item-specific basis. *See Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996); *Airgas Mid-America, Inc.* 812 N.E.2d at 845; *Howard*, 813 N.E.2d at 1217. Ohio Casualty has not proven that the all of Peterson's services to it have been the rendering of legal advice. Questioning Peterson regarding the claims adjustment process (without conceding that it has actually adjusted any claims) and requiring that she produce documents that shed light on the claims adjustment process does not invoke the attorney-client privilege and so must be allowed. The attorney-client privilege can, however, be invoked for information pertaining to general coverage issues (in contrast with the specific handling of the

underlying claims) and other legal advice.

C. The work product doctrine.

Also at issue in this case is whether the work product doctrine prohibits IMI from discovery of particular documents created by Peterson. Rule of Civil Procedure 26 provides in part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation . . . 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.

Federal Rule of Civil Procedure 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947). In determining whether there is a substantial need, simply arguing that the documents are necessary because the plaintiff has filed a bad faith claim against the defendant is insufficient. *Hartford*, 717 N.E.2d at 1237-38.

IMI's notice of deposition and duces tecum demanded Peterson to produce the following:

> 1. All of your claims-handling Documents and Records, as defined above, relating to the underlying liability claims brought against IMI by various claimants in Kentucky for the provision of allegedly defective concrete ("underlying claims"), excluding any attorney-client privileged materials pertaining to coverage litigation issues.
>
> 2. All of the Documents and Records, as defined above, relating to the handling, categorization, summarization, processing, review, or calculation of payment to IMI of any of the underlying claims or any expenses associated therewith, belonging to you or anyone else at the Kightlinger & Gray office, excluding any attorney-client privileged materials pertaining to coverage litigation issues.
>
> 3. All of the Documents and Records, as defined above, relating to any procedure involved with your claims-handling activities on behalf of Ohio Casualty, excluding any attorney-client privileged materials pertaining to coverage litigation issues.
>
> 4. Your communications with Ohio Casualty or its agents regarding the

> underlying claims, excluding any attorney-client privileged materials pertaining to coverage litigation issues.
>
> 5. Any other documents or materials regarding your handling of the underlying claims, excluding any attorney-client privileged materials pertaining to coverage litigation issues.

[Docket No. 604 at 4-5.]

The documents requested by IMI all pertain to the handling of the underlying claims, not general coverage issues, and Ohio Casualty has not provided a convincing argument for why they should be privileged as work product. Furthermore, IMI has provided evidence of substantial need beyond just that it has filed a bad faith claim against Ohio Casualty. In his deposition, Snider was unable to answer why it took so long for Ohio Casualty to pay some of the claims. [Docket No. 618, Ex. C, Part 4 at 258.] He was also unable to recall the date that two claims had been paid even though they had just been paid the week prior to the deposition. [*Id.* at 251.] Clearly Snider is not equipped to answer basic questions regarding the claims adjustment process. Ohio Casualty has not named anyone else with knowledge of the information necessary to answer these questions, and Snider has deferred to Peterson in his deposition answers. Thus, IMI has sufficiently demonstrated that it cannot obtain information on the claims adjustment process other than by Peterson and the documents she has prepared in this regard, and so IMI is entitled to these documents. IMI is not entitled to any documents pertaining to coverage issues or any other non-claims-adjustment legal advice rendered by Peterson to Ohio Casualty, which Ohio Casualty can exclude from production by way of a privilege log.

D. Indiana Rules of Professional Conduct.

Ohio Casualty is concerned that Peterson will be unable to participate as an advocate in

the trial if she is deposed. *Indiana Rule of Professional Conduct* 3.7 states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

While Ohio Casualty's concerns are well-grounded, the deposition alone will not automatically disqualify Peterson from advocating on behalf of Ohio Casualty at trial. Peterson's deposition may demonstrate that she will not be necessary as a fact witness. Likewise, by the time of trial, anything Peterson is able to testify to might be uncontested. Or, if Ohio Casualty can demonstrate that disqualifying Peterson would result in substantial hardship, she could be permitted to remain.

IV. Conclusion.

The Court is mindful of the special concerns and difficulties raised in connection with a request to depose opposing counsel, as well as the related subpoena duces tecum. Rarely will such discovery be appropriate. But when relevant information can be obtained no other way, and when the party claiming privilege fails to demonstrate that the information being sought is legal advice, the broad rules of discovery permit this inquiry. In this particular instance, the discovery may proceed.

Ohio Casualty's motion to quash subpoena and request for protective order [Docket No. 603] is denied. IMI shall be permitted to depose Peterson. This deposition shall be limited to questions concerning the claims adjustment process for Ohio Casualty, i.e., to clarify Peterson's role with respect to the claims at issue, and to shed light on why the claims adjustment process took so long. The deposition shall not delve into Peterson's legal advice to Ohio Casualty.

Likewise, IMI shall be entitled to Peterson's documents that pertain to the claims adjustment process, as opposed to documents that contain legal advice. Any such documents shall be produced within 30 days.

Dated: December 28, 2007

/s/ Tim A. Baker
Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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