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DISCOVERY OF THE CLAIM FILE AND THE WORK PRODUCT DOCTRINE

[Ref. Evidence Para. 3.09, Pleadings & Practice Para. 8.03, and Proving Fraud Para. 5.02]

A claim file contains valuable information for anyone bringing a lawsuit against an insured or against an insurance company in a bad faith situation. The file typically includes notes, internal memos, investigative and expert reports, and witness statements pertaining to the claim. The file also serves as a valuable contemporaneous history of the insurer's handling of the claim.

It is, of course, good claim handling practice to keep the claim file free of unnecessary and inflammatory comments that might be harmful to the insurer's position if read in open court. Because the general purpose of pretrial discovery is to allow access to relevant information, only limited protection is provided to otherwise discoverable trial preparation and work product materials. It is the purpose of this article to examine how the courts have applied work product protection.

The work product doctrine was first recognized by the Supreme Court in *Hickman v. Taylor*, 329 US 495 (1947), and is now codified in Federal Rule of Civil Procedure 26(b)(3). Most states have a work product provision similar to the federal rule. Rule 26 (b)(3) protects from discovery documents that are prepared in "anticipation of litigation." This protection extends to memos, notes, reports, photos, and witness statements (i.e., factual work product). The purpose of this rule is to ensure that the private files of a party (and a party's attorney or a representative of the party) will be protected from opposing counsel. The rule does allow a party to obtain factual work product if the party seeking its disclosure can show a "substantial need" for the materials and an inability to obtain its substantial equivalent from another source without "undue hardship." Rule 26(b)(3) also protects from discovery opinion work product such as mental impressions, conclusions, opinions, and legal theories concerning litigation. Opinion work product has a higher degree of protection, and is discoverable only in special circumstances such as when the opinions are at issue in the case.

ANTICIPATION OF LITIGATION

The key to work product protection is whether the document was prepared in anticipation of litigation. Materials prepared in the ordinary course of business, or materials that would have been created in essentially similar form irrespective of litigation, are not protected. Documents created after a lawsuit is threatened or commenced, or after a party employs an attorney, are generally considered materials prepared in anticipation of litigation and are protected from discovery. However, when a party begins an investigation before suit is formally commenced, it is difficult to determine if the materials were prepared in the ordinary course of business or whether they were prepared in anticipation of litigation. This is especially true in the context of insurance, because the very nature of an insurance carrier's business is to investigate claims that may or may not result in litigation. For instance, in *Wikel v. Wal-Mart Stores, Inc*. 197 FRD 493 (N.D. Oklahoma 2000) the plaintiff sought discovery of an accident report contained in the insurer's claim file. Despite the fact that there was a likelihood of litigation arising from the accident, the court found that the accident report was

generated as part of the insurer's routine claim investigation and, therefore, was discoverable. The court said:

> The fact that a defendant anticipates the contingency of litigation resulting from an event does not automatically qualify an accident report as work product. If the investigation of the accident would normally be undertaken, an investigative report developed in the ordinary course of business will not be protected as work product. Following any serious accident, it can be expected that designated personnel will conduct investigations, not only out of a concern for future litigation, but also to prevent reoccurrences, to improve safety and efficiency, and to respond to regulatory obligations.

Since it is often difficult to distinguish between ordinary course of business and anticipation of litigation in the context of insurance claims, courts focus on the insurer's conduct at the time the materials were created. Typically, courts grant work product protection if the primary motivating purpose behind the creation of the document is to assist in pending or probable future litigation. Specifically, courts look to identify the point at which claim investigation shifts to anticipation of litigation. In *Wikel*, the court found that the shift from routine claim investigation to anticipation of litigation occurred when the plaintiff threatened litigation. Since the accident report was generated as part of the insurer's routine claim investigation, well before the plaintiff threatened litigation, the court held that the insurer could not reasonably anticipate litigation at the time it secured the report. Thus, the report was discoverable.

To help identify in insurance cases when the shift from ordinary course of business to anticipation of litigation occurs, courts have adopted different approaches. On one extreme is an approach followed in only a few jurisdictions. This rule, criticized by other courts as being overly broad, holds that all documents in an insurer's file are considered to have been made in anticipation of litigation. There is no need to consider the facts of each case, the particular documents at issue, or when the shift from routine investigation to anticipation of litigation occurred. All information in the insurer's files is protected by the work product rule and cannot be discovered unless substantial need and undue hardship can be proved. In *Fontaine v. Sunflower Beef Carrier*, 87 FRD 89 (E.D. Missouri 1980), the plaintiff sought discovery of a nonparty witness statement given to the defendant's insurer on the date of the accident. Although no suit had been filed at the time the statement was given, the court held that the statement was prepared in anticipation of litigation. The court said:

> The anticipation of the filing of a claim is undeniable once an accident has occurred and a person injured or property damaged. This is especially true in today's litigious society. Documents prepared at that time, therefore, are clearly prepared in "anticipation of litigation" and "by or for another ... party's representative."
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> It must be conceded that in the context of an insurance investigation of an accident, the analysis hereby adopted will almost always result in a finding that the documents were prepared in anticipation of litigation.

The attorney involvement approach is on the other end of the spectrum, and is followed in many state courts. Under this approach, work product protection is only provided to materials prepared at the specific request of an attorney or under an attorney's supervision. The theory is that attorney involvement makes it more likely than not that the focus has shifted away from ordinary course of business toward litigation. Materials in the claim file before attorney involvement are presumed to have been prepared in the ordinary course of business and are subject to discovery. But, once an attorney is involved, work product protection might apply.

Merely hiring an attorney is not sufficient, though. The purpose for which the attorney was hired will also be considered. There must be a showing that the attorney's involvement caused the shift from routine investigation to preparation for litigation. Courts will examine the specific activities performed by the attorney to pinpoint whether the attorney's involvement caused the shift. In *Disidore v. Mail Contractors of America*, 196 FRD 410 (D. Kansas 2000), the plaintiff was injured in an automobile accident when a trailer became disengaged from the defendant's tractor unit. The plaintiff sought production of notes relating to conversations and interviews that were prepared by the defendant's employees. In support of its argument that the work product doctrine applied, the defendant submitted an affidavit from its defense counsel. The affidavit stated that the attorney was contacted by the defendant's insurer to seek his opinions regarding the investigation of the claim. However, the affidavit failed to mention whether the attorney's advice and recommendations were geared specifically to litigation preparation. Therefore, the court held that because the defendant failed to show that the attorney was hired to prepare for litigation, his involvement was not sufficient to protect the file from discovery.

Courts in the middle ground use a case-by-case approach. Under this method, courts consider various factors to fix the point at which a claim investigation shifts to anticipation of litigation. Many federal and some state courts use the case-by-case approach. This approach was adopted by the Utah Supreme Court in

Askew v. Hardman, 918 P2d 469 (1996). In *Askew*, the plaintiff was injured when the vehicle in which she was a passenger struck a horse on the highway. The plaintiff sued the owner of the horse. The plaintiff sought to obtain a recorded statement of the insured horse owner taken during the insurer's investigation of the claim. To determine whether the insured's statement was obtained in anticipation of litigation, the court used the case-by-case approach and identified the factors to be considered. The court held:

> We find the case-by-case approach more sound in determining whether the documents in an insurance claim file were prepared in anticipation of litigation. The trial court should consider the nature of the requested documents, the reason the documents were prepared, the relationship between the preparer of the document and the party seeking its protection from discovery, the relationship between the litigating parties, and any other facts relevant to the issue.

In *Askew*, the court examined the following factors to conclude that there was sufficient information to find that the statement was made in anticipation of litigation: that the statement was taken after the accident, that the insured told the police he feared he would be sued for his horse causing the accident, that the insured contacted his insurer, and that the insurer investigated the claim based on an attorney's instructions.

In *S.D. Warren Co. v. Eastern Electric Corp*., 201 FRD 280 (2001), the District Court of Maine observed that the case-by-case approach "realistically recognizes that at some point an insurance company shifts its activity from the ordinary course of business to anticipation of litigation, and no hard and fast rule governs when this change occurs." In this case the plaintiff sued the defendant contractor that performed electrical work for plaintiff's paper mill, alleging that the defendant caused a power outage. The plaintiff sought documents and communications that were made during the course of adjusting the claim, arguing that he was entitled to the information because the defendant's insurer was not anticipating litigation at the time of the investigation. In an attempt to prove the documents were created in anticipation of litigation, the insurer pointed out that the documents were prepared three months after the accident. The court was unpersuaded, stating that this information "shed little light on whether the materials at issue were prepared in anticipation of litigation." The court found that although the documents were prepared months after the accident, there was nothing contained in the documents to suggest that they were made in anticipation of litigation. Absent such proof, the court could not identify when the shift to anticipation of litigation occurred and the work product doctrine did not apply. The court said:

> unless and until an insurance company can demonstrate that it reasonably considered a claim to be more likely than not headed for litigation, the natural inference is that the documents in its claim file that predate this realization were prepared in the ordinary course of business.

SUBSTANTIAL NEED AND UNDUE HARDSHIP EXCEPTION

Once a court determines that a document was prepared in anticipation of litigation, it must then decide if the party seeking discovery has proved that the substantial need and undue hardship exception applies. As mentioned previously, work product protection can be overcome if the party seeking the material can show a substantial need for the information and an inability to obtain its substantial equivalent without undue hardship. Whether there is a substantial need depends on the facts and circumstances of each case and the party seeking the discovery must show that it cannot obtain the substantial equivalent of the material from another source without undue hardship.

For instance, in *Gargano v. Metro-North*, 222 FRD 38 (D.C. Connecticut 2004) the plaintiff sought audio taped statements of employees taken by a claim professional a day after an accident. The defendant gave the plaintiff summaries of the statements. The plaintiff argued that he had a substantial need for the actual transcripts because they represented a contemporaneous record and contained more specific information not found in the summaries. The plaintiff insisted that he had a substantial need for the audio tapes because he never took the witnesses' statements. The court disagreed and held that the plaintiff failed to establish substantial need because the plaintiff had an opportunity to depose the witnesses. The court described the circumstances that would demonstrate substantial need:

> Substantial need may exist when a witness is not available for depositions by the requesting party, or the witness cannot remember facts that he had recalled and related to the claims agent but could not recall at the time of the deposition. Substantial need may also exist if there is reason to believe that there is an inconsistency between the deposition testimony given by a witness and the information contained in the earlier statements of that witness.

The substantial need and undue hardship exception is often an issue in first party bad faith actions. In these cases the insured sues his own insurer for failing to handle the claim in good faith. Some courts have allowed the insured access to documents in the claim file in first party bad faith actions because the very nature of the

litigation tends to establish plaintiff's substantial need. Since the bad faith can only be proved by showing exactly how the company processed the claim, how thoroughly it was examined, and why the company took the action it did, the file becomes important as a history of the company's handling of the claim. Its substantial equivalent cannot be obtained in most cases. However, it is still the burden of the party seeking discovery to prove that the work product is discoverable.

In *Vesta Fire Insurance v. Figueroa*, 821 So2d 1233 (2002), a case in which the insured requested production of the claim file in her bad faith action against her insurer (for failure to provide coverage for a theft and vandalism claim), the Florida District Court of Appeals observed that the work product doctrine is

> not designed to allow access to an opposing attorney's file on the basis of "need" just because it is a veritable "road map" of the handling of the dispute. This rule provision is primarily designed for circumstances where the work of opposing counsel has produced a tangible item which the requesting party cannot now obtain or cannot obtain without undue hardship. Examples are photographs of a scene or of an object that has since changed or been lost, or a statement of a witness who has disappeared, become incapacitated or has become hard to reach. Work product is not obtainable just because the adversary's file is the best record of what the adversary was doing or thinking or planning in anticipation of litigation.
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> There has to be a showing that information cannot be obtained without undue hardship unless the claim file is turned over. This does not mean that getting the claim file is easier than asking questions or doing investigation. Nor does it mean the loss of opportunity to access an internal document containing a comment that would inflame the jury. It is instead a device to obtain a relevant factor or item of evidence that cannot be acquired any other way.

In *Bartlett v. State Farm Mutual Automobile Ins. Co.*, 206 FRD 623 (2002) the Southern District Court of Indiana protected the claim file in a first party bad faith action, holding that the substantial need and undue hardship exception was not met. In *Bartlett*, the insured filed suit against his insurer alleging bad faith for failing to tender the underinsured motorist policy limits. The insured sought discovery of an interrogatory summary and draft responses prepared by insurer's counsel, and the insurer challenged the discovery on the basis of work product. The court rejected the substantial need and undue hardship argument. The court held that there was no substantial need since there were "lesser-intrusive means" of obtaining the information such as a deposition of the adjuster to determine how the insurer handled the claim. The court also said that the insured was in the best position to reproduce information relating to his claim. Since there were other ways for the insured to obtain the information, the substantial need and undue hardship exception was not met.

CONCLUSION

How an insurer and its representatives handle a claim is an important factor in determining whether the insurer has to comply with a discovery request to produce the contents of the claim file. Documents in the file that were prepared in anticipation of litigation are generally protected by the work product doctrine. As discussed, determining whether an insurer's investigation of a claim was in anticipation of litigation or whether it was made in the routine course of business is no easy task. Therefore, it is important to consult your jurisdiction's applicable law to ascertain what method is used to make this determination. Even if the documents in the file are found to have been prepared in anticipation of litigation, the documents may still be discoverable upon a showing of substantial need and undue hardship.

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