IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNION PLANTERS BANK, N.A., Plaintiff,	)	
v.	)	02 CV 2321 Ma/P
CONTINENTAL CASUALTY CO., ET AL., Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM CONTINENTAL CASUALTY COMPANY

Before the court is Plaintiff's Motion to Compel Production of Documents from Continental Casualty Company (docket entry 78). The plaintiff, Union Planters Bank, N.A. ("Union Planters"), seeks to compel production of certain documents identified in defendant Continental Casualty Company's ("Continental") privilege log. Continental filed a response, arguing that the documents at issue are protected by the work product privilege. The matter was referred to the United States Magistrate Judge for determination. On October 30, 2003, the court heard argument on the motion. Counsel for all interested parties attended. Prior to the hearing, Continental submitted the documents at issue to the court for an *in camera* review. Based on the pleadings, the arguments of counsel,

151

and the court's *in camera* review of the documents, the court grants in part and denies in part plaintiff's motion to compel.

I. BACKGROUND

This case arises from Continental's denial of Union Planters' $25 million insurance claim for loss due to fraud. At all relevant times, Union Planters was insured by the defendants for various fraud-related losses. Continental served as the primary insurer, and each of the other defendants provided coverage in excess of the coverage provided by Continental. Union Planters contends that its $25 million claim is covered by the policies issued by the defendants, and seeks payment on the claim.

Union Planters first informed Continental of the multi-million dollar loss in September 2001. Continental assigned Lisa Block, who at the time was Assistant Vice President of Fidelity Claims, to handle the claim.[1] Block was the Continental employee responsible for deciding whether the loss was covered under the policy and whether to deny the claim.[2] On October 4, 2001, Block and Tom

---

[1]As discussed later in this court's order, Union Planters did not formally submit its proof of loss on the $25 million claim until February 15, 2002. However, given the substantial dollar amount of the loss and the events that transpired shortly after Unions Planters informed Continental of the loss in September 2001, the parties understood that the loss would inevitably lead to a claim.

[2]Block, who is a licensed attorney, began working for Continental in 1994 as a bond claims attorney, and later became Assistant Vice President of Continental's Fidelity Claims department. That department is responsible for handling claims

Kocaj, Vice President of Continental, met with John Brownyard from Union Planters and Joe Lammel from Marsh, Union Planters' insurance broker. Union Planters' litigation counsel, Tom Dyer, was also present at the meeting. The focus of the meeting was Union Planters' mortgage warehouse lending procedures and the events leading up to the $25 million loss. Continental learned that Union Planters had begun its own investigation of the loss in August 2001. According to Block, at the meeting she learned that Union Planters was funding advances to its borrower, Greatstone Mortgage, before it received the original promissory notes and mortgage documents. Based on the information revealed at that meeting, Block formed an initial opinion that the loss would likely not be covered under the policy.

On February 15, 2002, Union Planters submitted a detailed proof of loss formally documenting its $25 million claim. On March 19, 2002, Block wrote a letter to Union Planters denying the claim. Shortly thereafter, on May 1, 2002, Union Planters filed the present suit against the defendants seeking payment on its claim.

In its motion to compel, Union Planters asks the court to order Continental to produce the following documents listed on

---

brought by insured commercial and financial institutions for losses due to, among other things, employee dishonesty, forgery, alteration, and theft. In late October 2001, Block became the Director of Fidelity Claims and was in charge of that department. Although her title changed, at all relevant times, Block was the Continental employee primarily responsible for investigating and handling Union Planters' claim.

Continental's privilege log:

1. Email dated December 20, 2001, addressed to Continental employee Andrea McIntyre from Block (CNA 154).

2. Two copies of the same email dated November 26, 2001, addressed to Continental employees Block, Dolowich, and Roberts, from Tom Kocaj (CNA 250-253). One copy of the email contains handwritten notes in the margins.

3. Facsimile cover sheet dated November 19, 2001, addressed from Dolowich to Block (CNA 306).

4. Copy of policy with undated handwritten notes made by Block on several of the pages (CNA 326-378).[3]

5. Handwritten notes made by Block dated December 5, 2001 (CNA 379-380).

6. Handwritten notes made by Block dated December 3, 2001 (CNA 381-386).

7. Handwritten notes made by Block after October 4, 2001 (CNA 398-401).

8. Handwritten notes made by Block dated October 8, 2001 (CNA 402).

9. Duplicate of CNA 252-253, described in 2, above (CNA 3264-3265).

10. Email correspondence dated November 12, 2002, between Block and Continental employee Todd Greeley (CNA 3270).

Union Planters argues that the documents were not prepared in anticipation of litigation. In support of its argument, Union Planters points to the fact that all but one of these documents were created prior to the date that Continental denied the claim in

[3]Continental's privilege log does not indicate when Block prepared the handwritten notes on the policy, and the court in its *in camera* review could not find any date notations on the document. However, in her affidavit Block states that she has reviewed this document and that it was prepared after October 4, 2001.

March 2002, and indeed, even prior to the date that Union Planters formally submitted its proof of loss to Continental in February 2002. Union Planters further contends that none of the individuals involved in the preparation of these documents was acting at the direction of litigation counsel or otherwise preparing the documents for litigation.

Continental contends that at the conclusion of the October 4 meeting, Block made an initial determination that the loss would not be covered under the policy, and that the matter would likely result in litigation. Continental takes the position that the ten documents at issue, which were prepared by Block and other Continental representatives after the October 4 meeting, were prepared in anticipation of litigation. In support of its position, Continental submitted an affidavit from Block, as well as several pages of transcript from Block's deposition. In her affidavit, Block states that at the October 4, 2001 meeting, "we reviewed sufficient information to form an initial opinion that the loss incurred by Union Planters would not likely be covered under the policy issued by Continental Casualty." (Block Aff. ¶ 9). Therefore, "[a]ll documents, reports, and correspondence within Continental Casualty after October 4, 2001, were prepared in anticipation of potential litigation with Union Planters." (Block Aff. ¶ 10). Block further states that she has reviewed the documents at issue and "[e]ach of the documents of which Union Planters seeks production was prepared by employees of Continental

Casualty after October 4, 2001, and in anticipation of potential litigation with Union Planters." (Block Aff. ¶ 11).

II. DISCUSSION

Federal Rule of Civil Procedure 26(b) controls the scope of discovery. Rule 26(b)(3) provides that:

> a party may obtain discovery of documents and tangible things otherwise discoverable. . . and prepared in anticipation of litigation or for trial by or for that other party's representative (including the other 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 the materials when the required showing has been made the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed.R.Civ.P. 26(b)(3). In Toledo Edison Co. v. G A Technologies, Inc., 847 F.2d 335 (6th Cir. 1988), the Sixth Circuit established a sequential analysis that the court must use in determining whether the work product privilege applies. First, the court must determine whether the document is "otherwise discoverable under subdivision (b)(1)," that is, that the document is relevant and not privileged. Second, the party seeking to invoke the work product privilege must show that the information was (1) prepared in anticipation of litigation or for trial, and (2) prepared by that party or its representative. The parties can make or oppose this showing by submitting, among other things, affidavits made on personal knowledge, depositions, or answers to interrogatories.

Third, if such a showing is made, the burden shifts to the party seeking disclosure of the document to show (1) that the party has a substantial need for the information and (2) that the party is unable to obtain the substantial equivalent of the materials without undue hardship. Finally, even if the party seeking the document shows substantial need and undue hardship, the objecting party may avoid discovery by showing that the document contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.[4] Id. at 339-340; see also Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co. Of Pittsburgh, No. 93-3084, 1994 WL 58999, at *3 (6th Cir. Feb. 25, 1994); Guardsmark, Inc. v. Blue Cross and Blue Shield of Tenn., 206 F.R.D. 202, 206-07 (W.D. Tenn. 2002).

A. Relevance

The parties do not dispute the relevance of the documents, or whether the documents are "otherwise discoverable" under Rule 26(b)(1). In its response to Union Planters' document production request, Continental did not object to the production of these ten documents on any basis other than work product. In its response to

[4]The term "representative of the party" includes the same person as did the term "party's representative" set out earlier in the rule, including a party's attorney, consultant, surety, indemnitor, insurer, or agent. Toledo Edison, 847 F.2d at 340; see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992)("This is so whether the material was actually prepared by the attorney or by another 'representative' of the party.")

plaintiff's motion to compel, Continental states that plaintiff "correctly identifies the issue which this court must decide in determining the validity of Continental's assertion of the work product doctrine. Simply, the issue is whether the documents identified . . . were prepared by Continental and its representatives in anticipation of litigation." (Continental Mem. in Opp. at 3). Thus, the court finds that plaintiff has satisfied the first step in the analysis by making its initial showing. See Miller v. Federal Express Corp., 186 F.R.D. 376, 387 (W.D. Tenn. 1999).

B. Prepared in Anticipation of Litigation

The next step of the Rule 26(b)(3) analysis requires that the court consider whether the documents at issue were (1) prepared in anticipation of litigation or for trial, and (2) prepared by that party or its representative. Before addressing the issue of whether the documents were prepared in anticipation of litigation, it is appropriate first to correct Union Planters' misunderstanding regarding who is and who is not covered under Rule 26(b)(3). As part of its argument in favor of disclosure, Union Planters asserts that the work product privilege does not apply because "none of the individuals involved in the creation of the documents at issue were acting *at the direction of litigation counsel* or otherwise preparing for litigation." (Pla.'s Mem. in Support at 5) (emphasis added). In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court created a limited immunity from discovery of certain

documents prepared by an adverse party's counsel in anticipation of litigation. See Garvey v. National Grange Mutual Ins. Co., 167 F.R.D. 391, 393 (E.D. Pa. 1996). Rule 26(b)(3), however, expanded the scope of this privilege by expressly including the work product of a party, its agents and representatives, as well as that of the party's attorney. Id.; see also Carver v. Allstate Ins. Co., 94 F.R.D. 131, 133 (S.D. Ga. 1982). Thus, the work product privilege is not limited only to individuals acting at the direction of litigation counsel. See Stampley v. State Farm Fire & Cas. Co., No. 00-1540, 2001 WL 1518787, at *2 (6th Cir. Nov. 20, 2001); see also Chambers v. Allstate Ins. Co., 206 F.R.D. 579, 584-88 (S.D.W.V. 2002) (analyzing several cases that apply work product privilege to documents created by, among others, claims representatives and investigators).

The court now turns its attention to the anticipation of litigation analysis. Whether a document was prepared in anticipation of litigation depends upon whether, in light of the nature of the document and the factual situation in the particular case, the document was "prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." Arkwright Mutual, 1994 WL 58999, at *3 (quoting National Union Fire Ins. Co., 976 F.2d at 984) (emphasis in original); Stampley, 2001 WL 1518787, at *2; see also In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998); United States v.

Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983); Garvey, 167 F.R.D. at 393. The party's belief that "litigation will result is the initial focus of the inquiry[;]" that belief, however, must be "objectively reasonable." Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1260 (3d Cir. 1993); see also Arkwright Mutual, 1994 WL 58999, at *3 ("In summary, objective and subjective evidence shows that the documents were prepared because of the prospect of litigation."); Guardsmark, 206 F.R.D. at 209-10 (citing Sealed Case, 146 F.3d at 884); Garvey, 167 F.R.D at 394.

Although the test is easily stated, its application may not always be so straight-forward. This is particularly true in cases involving documents created by employees or agents of an insurance company who are involved with investigating an insurance claim. See Chambers, 206 F.R.D. at 584 ("Determining whether specific documents are work product can be quite difficult, especially in litigation over insurance coverage decisions"). As the court in Carver observed,

> The general rule for determining whether a document can be said to have been "prepared in anticipation of litigation" is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation, . . . (and not) in the regular course of business." . . . Paradoxically, insurance company investigating documents straddle both ends of this definition, because it is the ordinary course of business for an insurance company to investigate a claim with an eye toward litigation.

Carver, 94 F.R.D. at 134 (internal citation omitted). On the one hand, it can be said that insurance companies investigate reported

losses in the ordinary course of their business as they reach decisions to grant or deny coverage. See Chambers, 206 F.R.D. at 584. "At some point in its investigation, however, an insurance company's activity shifts from mere claims evaluation to an anticipation of litigation." Garvey, 167 F.R.D. at 394. In the context of an insurance claim, the fact that an investigation occurs before a lawsuit is filed "does not mean that it was not done because of the prospect of litigation." Stampley, 2001 WL 1518787, at *2. Moreover, depending on the circumstances of a particular case, a party may reasonably anticipate litigation even before the claim is denied. See id. (affirming district court's order extending work product privilege to insurance company's investigation documents created several months prior to denial of the claim).

In this case, the court finds that, with the exception of document 154, document 306,[5] and the insurance policy portion of document 326-378,[6] the documents in question were prepared because of the prospect of litigation. First, these documents were created by Block and other Continental employees after the October 4, 2001 meeting - the event that caused Block to form her initial opinion

[5]At the October 30, 2003 hearing, Continental conceded that documents 154 and 306 are not protected by the work product privilege.

[6]Document 326-378 is a copy of an insurance policy with Block's handwritten notes in the margins. Although the policy itself is not work product, Block's handwritten notes and markings that appear on the document are work product.

that Union Planter's claim would not be covered under its policy with Continental. (Block Aff. ¶ 11). Prior to the October 4 meeting, Block (who was in charge of investigating and handling the claim) reviewed Union Planters' file and knew that the loss totaled $25 million, which she considered (as does this court) to be a significant claim both for Continental and Union Planters. Union Planters' litigation counsel, Thomas Dyer, was present at the meeting, which caused Block to believe that Union Planters considered the claim to be potentially adversarial. At the meeting, Block learned from Union Planters how the loss occurred, and discovered that Union Planters was funding its borrower before it received the original promissory notes and mortgage documents. This information caused her to form her initial opinion that Continental had apparent defenses to the claim and that Continental ultimately would not cover the loss. Thus, it was reasonable for Block, who also happens to be an attorney, to believe that she was going to eventually deny the claim and, once that occurred, that Continental would be involved in litigating the claim. See Stampley, 2001 WL 1518787, at *3 ("State Farm or its representatives reasonably could have anticipated the prospect of litigation because of the allegedly 'suspicious nature' of the fire").

Second, the court's *in camera* review of the documents confirms the application of the privilege to the documents. Documents 326-378, 379-380, 381-386, 398-401, and 402, contain notes written by

Block that relate to Union Planters, insurance coverage issues, or the borrower of the $25 million, Greatstone Mortgage.[7] Documents 250-253 and 3264-3265 are three copies of the same email sent from Tom Kocaj to Block and other Continental employees that relate to coverage issues. Document 3270 is an email between Block and Continental employee Todd Greeley sent in November 2002 (after Union Planters filed suit) that relates to Union Planters.

Third, the affidavit and deposition transcript of Block supports Continental's position, including her statement that she reviewed the ten documents, and that each of the documents "were prepared by employees of Continental Casualty after October 4, 2001 and in anticipation of potential litigation with Unions Planters." (Block Aff. ¶ 11); see also Arkwright, 1994 WL 58999, at *3.

Union Planters argues that because it did not formally submit its proof of loss to Continental until February 15, 2002, Continental could not have anticipated litigation prior to that date. In support of its argument, Union Planters points out that in Block's deposition and in her email correspondence with Union Planters, she indicated that as of December 2001, she had not yet denied Union Planters' claim. However, the fact that Block had not formally denied the claim does not necessarily mean that she could

[7]As mentioned above, however, certain documents are not work product, since it does not appear that they were prepared because of the prospect of litigation. These documents include: (1) document 154, an email from Block instructing Andrea McIntyre to prepare envelopes for mailing; (2) document 306, a fax cover sheet from Ivan Dolowich to Block; and (3) the insurance policy portion of document 326-378.

not or did not anticipate litigation at an earlier time. See Chambers, 206 F.R.D. at 588. Moreover, although the claim was not formally submitted to Continental until February 15, 2002, the parties understood at least as early as October 4, 2001, that Union Planters had been conducting its own internal investigation since August 2001, and that a formal claim was going to be submitted by Union Planters after it concluded its investigation.

Union Planters further argues that not all of the documents were prepared by Block. To the contrary, all of the documents were prepared by Block, with the exception of documents 250-253, 3264-3265[8], and 306.[9] With respect to these documents, the fact that Block did not create or prepare these documents personally does not negate the applicability of the privilege, since Block was the Continental employee in charge of handling the claim, "and those actions started the causal chain that led to the preparation of these documents." Arkwright, 1994 WL 58999, at *3.

C. Substantial Need and Undue Hardship

Since Continental has met its burden of showing that the documents were prepared in anticipation of litigation, the burden shifts back to Union Planters to show that it (1) has substantial

[8]Document 250-253 and document 3264-3265 are all identical copies of the same two-page email, with the exception that document 250-251 contains additional handwritten notes in the margins.

[9]Document 3270, which is listed on Continental's privilege log as correspondence prepared by Todd Greeley (Continental's Director of D&O claims), contains information prepared by Block.

need for the materials in preparation of its case, and (2) is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Toledo, 847 F.2d at 339-40. The court finds that Union Planters has not met its burden. Specifically, in its motion Unions Planters does not discuss, much less describe in any detail, its substantial need for the materials or the undue hardship in obtaining the materials by other means. Instead, the only argument Union Planters raises in its motion is that the documents were not prepared in anticipation of litigation.[10]

III. CONCLUSION

For the reasons above, plaintiff's motion to compel is GRANTED with respect to the following documents: (1) document 154; (2) document 306; and (3) the insurance policy portion of document 326-378 (with all handwritten notes and markings redacted). Continental shall provide Union Planters with these documents within five (5) days from the date of this order. With respect to the remaining documents, the motion to compel is DENIED.

IT IS SO ORDERED.

TU M. PHAM
United States Magistrate Judge

1-28-04
DATE

[10]Similarly, at the October 30 hearing, Union Planters only argued that the documents were not prepared in anticipation of litigation.

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 151 in case 2:02-CV-02321 was distributed by fax, mail, or direct printing on January 29, 2004 to the parties listed.

Thomas R. Dyer
WYATT TARRANT & COMBS
P.O. Box 775000
Memphis, TN 38177

Douglas A. Black
WYATT TARRANT & COMBS
P.O. Box 775000
Memphis, TN 38177

John M. Gillum
MANIER & HEROD
One Nashville Place
150 4th Avenue North
Ste. 2200
Nashville, TN 37219

Sam H. Poteet
MANIER & HEROD
One Nashville Place
150 4th Avenue North
Ste. 2200
Nashville, TN 37219

Jeffrey S. Price
MANIER & HEROD
One Nashville Place
150 4th Avenue North
Ste. 2200
Nashville, TN 37219

H. Frederick Humbracht
BOULT CUMMINGS CONNERS & BERRY
P.O. Box 198062
414 Union St.
Ste. 1600
Nashville, TN 37219

Joseph T. Getz
LESS GETZ & LIPMAN
100 Peabody Place
Ste. 1000
Memphis, TN 38103

Michael Keeley
STRASBURGER & PRICE, LLP
901 Main St.
Ste. 4300
Dallas, TX 75202

John R. Riddle
STRASBURGER & PRICE, LLP
901 Main St.
Ste. 4300
Dallas, TX 75202

Toni Scott Reed
STRASBURGER & PRICE, LLP
901 Main St.
Ste. 4300
Dallas, TX 75202

Michael G. McLaren
BLACK MCLAREN JONES & RYLAND
530 Oak Court Dr.
Ste. 310
Memphis, TN 38117

Michael W. Higginbotham
BLACK MCLAREN JONES & RYLAND, P.C.
530 Oak Court Dr.
Ste. 310
Memphis, TN 38117

Tu M. Pham
U.S. MAGISTRATE JUDGE
167 N. Main
Rm. 934
Memphis, TN 38103

Honorable Samuel Mays
US DISTRICT COURT