COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. No: 05-1360-BLS2

Marcia Rhodes, Harold Rhodes, Individually, Harold Rhodes, on Behalf of his Minor Child and Next Friend, Rebecca Rhodes

Plaintiffs,

v.

AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc., National Union Fire Insurance Company of Pittsburgh, PA, and Zurich American Insurance Company

Defendants.

DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO M.G.L. c. 231, § 118

PETITIONER, ZURICH AMERICAN INSURANCE COMPANY,
By its attorneys,

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ARGUMENT[1]

This Petition presents the following issue of first impression regarding the discoverability of opinion work product: in a Chapter 93A case against a liability insurer founded upon its alleged failure to promptly settle an underlying tort action against its policyholder when liability became reasonably clear, are the mental impressions and opinions of insurance company claim representatives involved in making settlement decisions protected from disclosure by Massachusetts Rule of Civil Procedure 26(b)(3)?

Ruling on Plaintiffs' Motion to Compel in this case, the Trial Court held that such mental impressions are not protected by Rule 26(b)(3) because in this type of unfair claim settlement practices case, the conduct, state of mind and opinion work product of the claim representatives who made decisions regarding settlement is placed "at issue" by the mere allegation of bad faith. Memorandum and Order on Plaintiffs' Motion to Compel Defendants to Produce Documents ("Order") at 12. The errors in the

[1] All relevant pleadings, exhibits, and papers that were before the Trial Court and are relevant to the adjudication of the issues presented in this appeal are included in the Appendix to this Memorandum, attached hereto.

Trial Court's analysis lie in both its misapplication of legal doctrine and the breathtaking scope of the exception it carved out of Rule 26(b)(3)– an exception that will apply in virtually every case involving allegations of unfair claim settlement practices in violation of M.G.L. c. 93A and 176D §3(9)(f). Equally troublesome is the fact that, contrary to Rule 26(b)(3), the Trial Court ordered disclosure of documents reflecting opinion work product despite that the "substantial equivalent" of the documents can be obtained by Plaintiffs, without undue hardship or even inconvenience, through depositions of certain of Zurich's claim representatives. The Trial Court's Order requiring disclosure of Zurich's work product is an abuse of discretion and should be reversed.

I. The Trial Court Did Not Properly Apply the Two-Part Test for Disclosure of Work Product Set Forth in Rule 26(b)(3).

In Massachusetts, as in most jurisdictions, the Rules of Civil Procedure provide special protection against disclosure of documents that a party or its representative prepared in anticipation of litigation. Pursuant to Rule 26(b)(3), discovery of an adversary's work product may not be had unless the party seeking the discovery proves that, (1) he "has substantial need

of the materials in the preparation of his case;" and (2) he "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[2] As used in Rule 26(b)(3), the term "substantial equivalent" does not mean "exact duplicate." Raffa v. Gymnastics Learning Center, Inc., 00-1966A, 2002 WL 389889, *3 (Mass. Super., Jan. 2, 2002), citing 7 SMITH AND ZOBEL, RULES PRACTICE, § 26.5.[3]

The Trial Court correctly determined that reports and other documents prepared by certain of Zurich's claim representatives and relating to the Tort Action qualified as opinion work product, but it ordered Zurich to disclose those materials anyway. Because the "substantial equivalent" of these documents can be obtained by Plaintiffs without any hardship or inconvenience through depositions of the claim representatives who authored the documents, the Trial

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[2] Rule 26(b)(3) further provides that in ordering disclosure of work product 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," otherwise known as "opinion work product." The Trial Court's failure to abide by this requirement is addressed in Section II, infra.

[3] All unpublished decisions cited in this Memorandum are attached hereto as Exhibit F.

Court abused its discretion in ordering their production.

Both the state and federal courts in Massachusetts have denied access to investigative reports and similar documents reflecting the work product of a party's representative where the authors of the documents, or witnesses mentioned therein, were available for a deposition. See e.g., Colonial Gas Co. v. Aetna Casualty & Sur. Co., 139 F.R.D. 269, 275 (D. Mass. 1991)("Discovery of work product will therefore be denied where the party seeking discovery can obtain the information by taking the deposition of witnesses.") For example, in Harris v. Steinberg, the Superior Court denied a medical malpractice plaintiff's motion to compel investigative reports of the hospital's insurance claim representatives where "the plaintiffs ha[d] not yet even attempted to discover the information sought by interviewing, deposing or serving interrogatories on either the individuals with knowledge of the circumstances of [the decedent]'s treatment or those involved with investigating [her] death and preparing the reports and other documents at issue." 1997 WL 89164, *4 (Mass. Super., Feb. 10, 1997); see also Bondy v.

Brophy, 124 F.R.D. 517, 518 (D. Mass. 1989) (report reflecting work product of investigator was not discoverable where witnesses mentioned in report were available for deposition); Raffa, 2002 WL 389889 (denying motion to compel accident investigator's work product where plaintiff could depose witness regarding contents of document); Poteau v. Normandy Farms Family Campground, Inc., 2000 WL 1765424, *3 (Mass. Super., Aug. 1, 2000) (same).

In this case, the Trial Court's Order describes no effort by Plaintiffs to prove that the substantial equivalent of the documents reflecting the opinion work product of Zurich's claim representatives was unavailable through other means, presumably because Plaintiffs made no such effort. The Court improperly ignored the second prong of the Rule 26(b)(3) test and directed Zurich to produce the opinion work product of certain of its claim representatives despite the fact that those representatives can be deposed. Indeed, the Trial Court actually reasoned that the opinion work product should be turned over ***because*** the claim representatives are available for depositions. Order at 13. The Court's analysis is fundamentally flawed.

By reviewing the hundreds of claim file documents that Zurich has already produced and by deposing the claim representatives involved in making settlement decisions, Plaintiffs can thoroughly discover the nature of and reasons for all actions and decisions the representatives took or made. Moreover, Plaintiffs may inquire in depositions about the mental impressions and opinions the claim representatives formed at relevant times. Though the deposition testimony may not be the "exact duplicate" of the written opinion work product in all instances, Rule 26(b)(3) only entitles Plaintiffs to the "substantial equivalent" of that material. See Raffa, 2002 WL 389889 at * 3.

Rather than address whether the substantial equivalent of Zurich's opinion work product was available through depositions or other means, the Trial Court focused on Plaintiffs' alleged need for those materials and the potential usefulness of the materials during cross-examination of the claim representatives. Order at 13. The heightened protection given to opinion work product under Rule 26(b)(3) should not be peeled back merely because a document may be helpful to an opposing party's case. Though a plaintiff may wish for all work product in the claim file in order to "impeach

the adjuster and/or corroborate her allegation of bad faith..., she cannot have it based on mere conclusory allegations. Were it otherwise, insurers could be deprived of work product protection...in all cases by mere allegations of bad faith, however frivolous." Ring v. Commercial Union Ins. Co., 159 F.R.D. 653, 658 (M.D.N.C. 1995); see also Mordesovitch v. Westfield Ins. Co., 244 F.Supp.2d 636, 647 (S.D. W.Va. 2003)("The Court is sensitive to the challenges Plaintiff may face in proving bad faith without access to the whole of every document in the claims file. However...'[i]n clear language, Rule 26 provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence.'")

Not MBS case

Absent a showing by Plaintiffs that the substantial equivalent of the disputed opinion work product they seek was unavailable through depositions or other less intrusive means, the Trial Court should not have ordered Zurich to produce that material. The Court abused its discretion by ignoring the second prong of the Rule 26(b)(3) test, and its resulting Order must be reversed.

II. The Trial Court Created an Exception to the Work Product Doctrine That Is Inconsistent With Rule 26(b)(3) and Unsupported by Law.

As shown above, the Trial Court failed to apply the two-part test set forth in Rule 26(b)(3). However, even where a court adheres to the Rule and finds that both of its prongs are satisfied, 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." Rule 26(b)(3). The Trial Court failed to do so here.

In its Order, the Trial Court acknowledged that Rule 26 affords a heightened level of protection for the opinion work product of a party's representatives, including insurance claim agents. Order at 11. Nevertheless, in an unprecedented step, the Court held that no such protection is available for the opinion work product of those representatives in Chapter 93A cases because in such cases, the state of mind, mental impressions and conduct and of the insurance claim representatives who participate in settlement decisions are "at issue." Id. at 12. This Court should reverse the Trial Court's Order because it is contrary

to law, defies the letter and spirit of Rule 26(b), and would lead to wholly undesirable results.

A. The Trial Court's Analysis Distorts the "At Issue" Exception to the Work Product Doctrine

The "at issue" doctrine is an exception to the work product rule and the attorney-client privilege that requires production of otherwise protected materials where the party asserting the privilege places the materials at issue in the case and thereby waives the privilege. See Darius v. City of Boston, 433 Mass. 274, 284 (2001) (describing and accepting premise of "at issue" exception). Courts in Massachusetts have observed that the exception applies only when, (1) by some affirmative act, (2) a party makes the protected information relevant to the case, and (3) the opposing party is thereby denied access to information vital to its defense. Sax v. Sax, 136 F.R.D. 542, 543-44 (D. Mass. 1991); see also Dedham-Westwood Water Dist. v. Nat'l. Union Fire Ins., 96-00044, 2000 Mass. Super. Lexis 31, *12 (Mass. Super. Feb. 15, 2000)(citing same factors).

In this case, the Trial Court did not conclude that Zurich took some affirmative act that placed the state of mind, mental impressions or work product of

its claims representatives "at issue" so as to waive protection for it. Order at 11-15. Indeed, there is nothing in Zurich's *Answer and Affirmative Defenses* from which one could reasonably infer Zurich's intent to rely on documents reflecting the opinion work product of those employees and claim representatives involved in determining the amount or timing of its settlement offer to Plaintiffs.[4] Under these circumstances, the "at issue" exception simply does not apply.

Turning the "at issue" exception on its head, the Trial Court essentially held that a ***plaintiff*** in a Chapter 93A action against an insurer can place the opinion work product of insurance claim agents "at issue," and thereby deprive the insurer of the protection afforded by Rule 26(b)(3), merely by alleging that the insurer engaged in unfair claim settlement practices. Other courts have declined to contort the "at issue" exception in this manner. See

[4] While Zurich denied Plaintiffs' various allegations of unfair claim settlement practices in its Answer and Affirmative Defenses, (see Exhibit B), such denials are insufficient to invoke the "at issue" exception. See Bartlett v. State Farm Mut. Auto. Ins. Co., 206 F.R.D. 623, 627 (S.D. Ind. 2002); Dixie Mill Supply Co., Inc. v. Continental Cas. Co., 168 F.R.D. 554, 557 (E.D. La. 1996).

e.g. Dixie Mill Supply, 168 F.R.D. at 557 (declining to apply "at issue" exception based on mere allegations of bad faith by plaintiff); see also Cardtoons, L.C. v. Major League Baseball Players Assoc., 199 F.R.D. 677, 681 (N.D. Okla. 2001)("at issue" exception did not apply absent proof that defendant affirmatively put its opinion work product "at issue.")[5] Since the Trial Court's Order is predicated on a misapplication of the "at issue" exception, it should be reversed.

B. The Trial Court's Order Defies the Clear Mandate of Rule 26(b)(3)

As noted above, Rule 26(b)(3) provides that courts "shall protect against" disclosure of opinion work product even where the two-part test of Rule

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[5] To support its construction of the "at issue" exception, the Trial Court relied heavily on Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573 (9th Cir. 1992). The Holmgren court did not explain which party must place the mental impressions of claim representatives "at issue" in order to trigger the exception, however. Nor does the Holmgren court's opinion reveal whether the plaintiff or defendant placed the defendant's mental impressions at issue in that case. If the plaintiff placed the insurer's opinion work product in issue by alleging bad faith, then Holmgren is inconsistent with the "at issue" exception as applied in Massachusetts. If the insurer-defendant placed its mental impressions at issue, however, then Holmgren is distinguishable from this case on its facts. In any case, Holmgren is inapposite.

26(b)(3) is satisfied. The use of the word "shall," as opposed to "may" or "should," in this clause of Rule 26(b)(3) evinces the Rules drafters' recognition of the sanctity of opinion work product and an intent that it be afforded the highest degree of protection. It is ostensibly for this reason that the Reporter's Notes to Rule 26 state that opinion work product of a party's attorneys, investigators and claim-agents must be protected from disclosure in all but "extremely unusual circumstances." Reporter's Notes, Mass. R. Civ. P. 26(b).

Neither the Reporter's Notes nor the case law interpreting Rule 26(b)(3) provides guidance as to the meaning of the phrase "extremely unusual circumstances" in this context.[6] Nonetheless, the Trial Court construed that language liberally and determined

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[6] The Trial Court's reliance on Ward v. Peabody, 380 Mass. 805, 818 (1980), as an example of a circumstance in which disclosure of opinion work product was allowed is misplaced. The Supreme Judicial Court's decision to compel production of the lawyer's work product in Ward was based on its finding that the materials were not prepared in anticipation of litigation. In addition, the work product in Ward was requested in a legislative investigation, and work product protection had never been applied to withhold documents in that context. The portion of the Ward decision quoted in the Trial Court's Order was unnecessary to the Supreme Judicial Court's holding and, as such, constitutes dicta.

that "extremely unusual circumstances" exist here because Zurich's state of mind, conduct, and the reasonableness of the settlement offer it made to Plaintiffs during the Tort Action are "the focus of this case." Order at 12.

Contrary to the Trial Court's view, there is nothing remotely unusual about the circumstances presented by this case. The conduct of an insurance company and the reasonableness of its coverage and settlement positions are the focus of every M.G.L. c. 93A action founded upon alleged violations of M.G.L. c. 176D §3(9)(f). If affirmed, the Trial Court's rule would result in invasion of the opinion work product of insurance claim representatives in virtually every unfair claim settlement practices case filed in the Commonwealth, even those cases lacking in merit. Such a broad exception to the work product doctrine is plainly inconsistent with the letter and spirit of Rule 26(b)(3), which contemplates far greater protection for the mental impressions of a party's representative. See Ring, 159 F.R.D. at 658 (recognizing that insurers should not be deprived of work product protection based on mere allegation of unfair claim settlement practice). Moreover, there is

nothing in the text of Chapter 93A to suggest that in creating a cause of action against insurers pursuant to Section 9 of that Chapter, the Legislature intended to exempt claim representatives' work product from the protections afforded by Rule 26(b)(3).

The error in the Trial Court's ruling becomes all the more apparent when one considers the unsavory results it would yield. First, the Trial Court's rule would encourage the filing of baseless M.G.L. c. 93A lawsuits against insurance companies. If, as the Trial Court held, a Chapter 93A plaintiff can gain access to opinion work product in an insurer's claim file merely by alleging that the insurer engaged in unfair claim settlement practices, counsel for any claimant dissatisfied with an insurance settlement or adverse claim decision would have an incentive to file a Chapter 93A action simply to gain access to the insurer's work product and attempt to find *something* that might support the cause of action. This risk is far too great for the courts to bear.

Second, if Massachusetts law were to afford no protection whatsoever for the mental impressions of insurance claim representatives in Chapter 93A cases, it would discourage claim representatives handling

claims in the Commonwealth from candidly and thoroughly recording, reporting and otherwise communicating their opinions regarding coverage, liability and damages in written form due to fear of disclosure in a future Chapter 93A lawsuit. That result would conflict with M.G.L. c. 176D, which obligates insurers to "implement reasonable standards for the prompt investigation of claims arising under insurance policies" and to conduct a "reasonable investigation based upon all available information." M.G.L. c. 176D, § 3(9). The Legislature could not have intended that outcome.

CONCLUSION

For the foregoing reasons, Zurich American Insurance Company respectfully requests this Court to GRANT its Petition and REVERSE the Trial Court's Order as requested in said Petition.

CERTIFICATE OF SERVICE

I, Danielle Andrews Long, certify that on this 2nd day of February, 2006, I caused a copy of the foregoing to be served by hand upon:

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