20 Fla. L. Weekly Supp. 1176a

Online Reference: FLWSUPP 2012UDEL

Insurance -- Discovery -- Work product privilege -- Where claims file documents sought by plaintiffs were generated as part of insurer's adjustment of plaintiffs' claim and were not prepared in anticipation of litigation, documents are subject to production -- No merit to argument that materials are privileged simply because they reside in claims file -- Motion to compel is granted

RONALD UDELSON and ELISE UDELSON, Plaintiffs, v. NATIONWIDE INSURANCE COMPANY OF FLORIDA, THE PEPPER ENGINEERING GROUP, INC., AND FEDERAL INSURANCE COMPANY, Defendants. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Civil Division. Case No. 12-25140 CA 20. April 5, 2013. Michael A Hanzman, Judge.

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL

Plaintiffs, Ronald and Elise Udelson ("Plaintiffs" or "Udelsons"), seek an order compelling the production of certain documents identified on Defendant Nationwide Insurance Company of Florida's ("Defendant" or "Nationwide") privilege log. The documents are contained within what Nationwide describes as its "Claims File." Nationwide has not attempted to show -- nor does any evidence suggest -- that the documents were prepared in anticipation of litigation with the Udelsons. Rather these materials -- which the Court has examined -- were generated as part of Nationwide's adjustment of their claim; an activity that is required by the terms of its policy and performed in the ordinary course of an insurance carrier's business.

Because Nationwide has made no showing that these documents were prepared in anticipation of litigation, as opposed to part of an "investigation conducted during the normal business of evaluating the claim," the documents appear clearly subject to production. *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192 (Fla. 4th DCA 1991) ("While petitioner claims that much of what was requested is work product, there is no showing whether the materials in question were prepared in anticipation of litigation with respondents or were investigations conducted during the normal business of evaluating the claim made by respondents, petitioner's insured"); *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2116b] (insurance carrier objecting to discovery on the basis of work-product privilege "maintains the burden to show that the materials were compiled in response to some event which foreseeably could be made the basis of a claim against the insurer"); *Cotton States Mut. Ins. Co. v. Turtle Reef Associates, Inc.*, 444 So. 2d 595, 596 (Fla. 4th DCA 1984) (work product privilege attaches only to material prepared by insurer "in contemplation of litigation," not as part of investigation conducted in "the ordinary course of business").

Nationwide nevertheless maintains that documents in its "claims file" are immune from discovery in an insured's first party breach of contract action, relying on decisions which -- in a somewhat imprecise manner -- do say that an insurers "claims file" is *generally* not discoverable in a first party coverage dispute. *See, e.g.*, *Seminole Cas. Ins. Co. v. Mastrominas*, 6 So. 3d 1256 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D559b] (because an insurer's claim file is "generally not discoverable," a trial court "departs from the essential requirements of the law in compelling disclosure of the contents of an insurer's claim file when the issue of coverage is in dispute and has not been resolved"); *State Farm Mut. Auto. Ins. Co. v. Tranchese*, 49 So. 3d 809 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2590a] ("until the obligation to provide coverage and damages has been determined, a party is not entitled to discovery from an insurer related to the claims filed or to the insurer's business policies or practices regarding handling of claims"); *State Farm Florida Ins. Co. v. Aloni*, 101 So. 3d 412, 414 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D2737a] (Generally, an insurer's claim file constitutes work product and is protected from discovery prior

to a determination of coverage"). According to Nationwide these decisions recognize a "claims file" privilege, relieving it of any burden to show that the materials it seeks to withhold were prepared in "anticipation of litigation" -- and thus constitute traditional work product. Put another way, Nationwide insists that materials are privileged -- and hence beyond the reach of its adversary -- simply because they reside in its "claims file." The Court disagrees.

As the object of a judicial proceeding is to seek the truth, our Rules of Civil Procedure provide that "parties may obtain discovery regarding any matter not privileged that is relevant to the subject matter of the pending action. . .," and that such discovery is permissible so long as the "information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Civ. P. 1.280(b)(1). The scope of this rule is broad. *Argonaut Ins. Co. v. Peralta*, 358 So. 2d 232 (Fla. 3d DCA 1978).

Privileges, by their nature, impede the search for the truth. The law nevertheless recognizes that in limited circumstances a compelling public policy justifies denying access to otherwise relevant information; granting a litigant the "privilege" to withhold evidence no matter how probative it might be. One such "privilege" -- the work product doctrine -- allows a party to withhold "materials prepared in anticipation of litigation by or for a party or its representative . . . unless the party seeking the discovery has need of the material and is unable to obtain the substantial equivalent without undue hardship." *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384 (Fla. 1994). Fla. R. Civ. P. 1.280(b)(3). This "work product privilege" is premised on the rationale that "one party is not entitled to prepare his case through the investigation work product of his adversary where the same or similar information is available through ordinary investigation techniques and discovery procedures." *Dodson v. Persell*, 390 So. 2d 704, 708 (Fla. 1980).

A party withholding relevant evidence on a claim of privilege bears the burden of demonstrating its applicability. *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192 (Fla. 4th DCA 1991*); Nationwide Mut. Fire Ins. Co. v. Hess*, 814 So. 2d 1240 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1005a]; *First City Developments of Florida, Inc. v. Hallmark of Hollywood Condo. Ass'n, Inc.*, 545 So. 2d 502, 503 (Fla. 4th DCA 1989) ("Clearly, objections such as attorney-client privilege or work product are viable objections, although the petitioners have the burden of proving such privileges apply.") When the "work product" privilege is asserted the party resisting discovery must show that the materials withheld were prepared "in anticipation of litigation." *Progressive Am. Ins. Co. v. Lanier*, 800 So. 2d 689, 690 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2837a]; Fla. R. Civ. P. 1.280(b)(3).

To satisfy this requirement an insurance carrier must demonstrate that the materials were "compiled in response to some event which foreseeably could be made the basis of a claim." *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 910 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2116b]. The critical question then is at what point does the submission of a "claim" by an insured turn into an "event" which "foreseeably" could result in litigation. The answer is case specific and not always "easy to determine." *See Airocar, Inc. v. Goldman*, 474 So. 2d 269 (Fla. 4th DCA 1985). "In the insurance context, a document may be deemed to have been prepared in anticipation of litigation if it was created after the insured tendered its claim for coverage; if it begins to appear that the insurer might deny coverage or reserve its rights; the insurer denies coverage; if coverage litigation appears imminent; or if coverage litigation commenced." *Kaufman*, 885 So. 2d at 910. It is clear, however, that every document generated as part of an insurance company's ordinary business of adjusting a loss is not work product. Like every other litigant, an insurance company withholding evidence on a claim of work product privilege must show that the material was prepared "in contemplation of litigation," *see Cotton States Mut. Ins. Co. v. Turtle Reef Associates, Inc.*, 444 So. 2d 595, 596 (Fla. 4th DCA 1984), and "the [m]ere general likelihood of litigation in the corporation's ordinary conduct of business is not enough for a claim of work product protection." *Neighborhood Health P'ship, Inc. v. Peter F. Merkle M.D., P.A.*, 8 So. 3d 1180, 1184 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D766a]. Rather "[t]here must be some specific matter reasonably

indicating litigation beyond the general business prospects of eventually being sued." *Id*.

Put simply, an insurance company, like all other litigants, must show that the subject materials were prepared in anticipation of litigation, as opposed to a part of an investigation "conducted during the normal business of evaluating the claim" made by its insured. *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192 (Fla. 4th DCA 1991). Insurance companies are in the business of issuing policies and adjusting claims, not the business of litigating them, and the vast majority of claims submitted by their insureds do not result in adversary proceedings. And while it is theoretically "possible" that any claim submitted by an insured will wind up in litigation, every document generated as part of an insurer's adjustment activities is not immune from discovery.

The authorities relied upon by Nationwide, with one possible exception, do not suggest otherwise. In *Seminole Casualty, supra,* the court observed that a "claims file is generally not discoverable" in a first party breach of contract action, without discussing what types of documents were at issue, and without analyzing whether they were prepared in anticipation of litigation. The documents involved may very well have been "work product." *State Farm Mut. Auto. Ins. Co. v. Tranchese*, *supra*, involved requests for admissions regarding "business practices and claim policy procedures" which the court found were not subject to discovery "until the obligation to provide coverage and damages has been determined. . ." 49 So. 3d at 810. The court did not say why this information was not discoverable or undertake any privilege analysis.

In *State Farm Florida Ins. Co. v. Aloni*, *supra*, the "notes" in dispute were generated after the filing of the claim and an affidavit filed by the insurer established that they contained "personal thoughts, evaluations, mental impressions, and recommendations regarding the claim and the possibility of litigation." 101 So. 3d at 413. The court therefore found, as a factual matter, that the "notes were prepared in contemplation of litigation because the late reported claim was a foreseeable basis for litigation." *Id*. The *Aloni* court engaged in a traditional work product analysis even though it, like other courts, observed that "generally, an insurer's claim file constitutes work product and is protected from discovery prior to a determination of coverage." *Id* at 414.

None of these decisions recognize the "claims file" privilege Nationwide posits. Nor does the Supreme Court's decision in *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005) [30 Fla. L. Weekly S219c], another case relied upon by Nationwide. The *Allstate* court was presented with conflicting district court decisions regarding "issues concerning application of work product privilege to shield documents from discovery in the insurance bad faith context." *Id*. Some district courts had held that the work product privilege attached when litigation is "substantial and imminent," while others had held that it attached so long as legal action was "merely foreseeable." *Id*. Although they applied different standards in determining when the work product privilege attached, these courts informally embarked upon a traditional work product analysis to determine whether documents withheld from discovery were in fact "privileged."

The *Allstate* court ultimately determined that a resolution of this conflict was "unnecessary" because an insurer's "claims file," which is generally work product protected from production in a first party coverage case, is "certainly material and relevant, if not crucial, to any intelligent and just resolution of the bad faith litigation." *Id* at 1124. The court therefore concluded that documents which may have in fact been privileged (i.e., truly work product) and thus not discoverable in an underlying first party contract action, were nevertheless discoverable in a subsequent "bad faith" case. The *Allstate* decision therefore expanded an insured's ability to seek discovery in a "bad faith" case by allowing access to actual "work product" developed in the underlying contract dispute; materials the court described as an insurer's "claim litigation file." *Id*. But the *Allstate* court did not hold, or remotely suggest, that all documents contained in a "claims file" generated as part of a carrier's ordinary adjustment process are, *ipso facto*, protected "work

product."

The only case cited by Nationwide which apparently departs from well settled work product privilege jurisprudence is *Nationwide Ins. Co. of Florida v. Demmo*, 57 So. 3d 982 (Fla. 2d DCA 2011) [36 Fla. L. Weekly D707a]. Though the trial court in *Demmo* ordered production of certain "claims file" materials upon finding that they "were not prepared in anticipation of litigation," the second district reversed, holding that:

> It appears, however, that the trial court focused on the question of what is and what is not work product with regard to the documents sought. But that is not the determinative issue. Rather, the issue turns on what type of action Demmo has brought. Here she is not pursuing a bad faith claim, but rather seeks relief for breach of contract. "A trial court departs from the essential requirements of the law in compelling disclosure of the contents of an insurer's claim file when the issue of coverage is in dispute and has not been resolved." *Seminole Cas. Ins. Co. v. Mastrominas*, 6 So.3d 1256, 1258 (Fla. 2d DCA 2009) [34 Fla. L. Weekly D559b] (emphasis added).

Id. It therefore seems that the *Demmo* court indeed jettisoned a traditional "work product" analysis and found "claims files" *per se* privileged absent "a bad faith" claim without "regard" to whether they were in fact prepared in anticipation of litigation.

The Court concludes that *Demmo* is contrary to binding authority in this district. *See Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D2116b]; *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1425a]. *Demmo* also is contrary to long standing precedent throughout our state and is, in this Court's opinion, incorrectly decided. *See, e.g., Airocar, Inc. v. Goldman*, 474 So. 2d 269, 270 (Fla. 4th DCA 1985) ("we have respectfully urged the trial courts of this district to focus, in their orders, upon whether the material involved was prepared in anticipation of litigation").

While an insurer's "claims file" may often contain "work product," and even may *generally* not be discoverable in a first party breach of contract case, "such a finding is not automatic." *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444 (Fla. 3d DCA 2006) [31 Fla. L. Weekly D1425a]. Every document generated as part of an insurer's adjustment of a claim is no more "work product" than is every document generated in connection with the ordinary activities of any other business. As the fourth district observed:

> We must not forget that the work product doctrine was created as a litigation privilege. It was never meant to apply to ordinary, routine, business-as-usual communications. That obviously means that it was not intended to protect the general foreseeability of being sued in the course of business-something HMOs routinely face. Hence we think, at a minimum, a claim of work product protection requires that a specific litigation matter can be reasonably anticipated as a result of an occurrence or circumstance -- such as an act giving rise to the accrual of a cause of action.

Neighborhood Health P'ship, Inc. v. Peter F. Merkle M.D., P.A., 8 So. 3d 1180, 1184 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D766a]. "[T]he operative terminology" in Fla. R. Civ. P. 1.280(b)(3) is "prepared in anticipation of litigation," and a mere possibility of litigation does not satisfy this requirement. *Id*. And the suggestion that an insured's "claims file" is always "protected" in a first party breach of contract case and only "discoverable" in a bad faith action is a gross oversimplification.

The bottom line is that documents in an insurance carrier's file -- like documents in any litigant's file -- that are relevant or reasonably calculated to lead to the discovery of admissible evidence are discoverable unless, and only unless, privileged. *See* Fla. R. Civ. P. 1.280(b)(1). It makes no difference whether the

document in the insurer's file is an “activity log,” “claims manual,” “photograph” of the damaged property, or anything else.[1] Nor does it matter how the material is labeled by the carrier, or where it is located within the insurer's “file.” Such material is protected by the work product privilege if, and only if, it is prepared “in anticipation of litigation.” *See* Fla. R. Civ. P. 1.280(b(3). The law, quite simply, does not recognize a “claims file” privilege.

As Nationwide has not shown -- or attempted to show -- that the documents at issue were prepared “in anticipation of litigation,” Plaintiff's Motion to Compel is granted. The materials identified in categories 5 and 6 of Nationwide's privilege log shall be produced within ten (10) days of the date of this Order.

_____

[1]For reasons the Court does not comprehend, appellate courts seem to be particularly protective of an insurance company's claims manuals and similar materials related to its adjusting guidelines. While such material *may* not always be relevant in first party contract cases, it is difficult to see how they could possibly be privileged. In any event, no such materials are at issue here.

* * *