COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civ. Act. 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.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' PETITIONS FOR INTERLOCUTORY RELIEF PURUSUANT TO M.G.L. c. 231, § 118

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES INDIVIDUALLY, and HAROLD RHODES ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES,

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This case arises out of the unfair settlement practices of the Defendants AIG Domestic Claims, Inc. f/k/a AIG Technical Services, Inc. ("AIGDC"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and Zurich American Insurance Company ("Zurich"). Plaintiff, Marcia Rhodes, was permanently paralyzed on January 9, 2002 when a tractor-tanker truck smashed into her stopped car. Zurich and National Union insured all defendants in the underlying action, and AIGDC was National Union's claims administrator. As Judge Gants stated in the January 23, 2006 Order (the "Order"):

> Despite the extensive medical costs the Rhodes were incurring and the strong evidence of permanent injury, Zurich did not offer its $2 million policy until March 2004, and made that offer contingent on the release of all the plaintiffs' claims against all the defendants. The offer was rejected.

Order at 2-3. AIGDC did not make any settlement offer until mediation in August, 2004,one month before trial. That $3.5 million offer covered the Defendants' estimates of special damages, and left less than $1 Million as compensation for Marcia Rhodes' pain and suffering and the consortium claims of her husband Harold and daughter Rebecca.

Before the trial in September 2004, the Defendants admitted to liability and thus contested only the amount of damages. The jury awarded the

plaintiffs $9,412,000 in damages; pre-judgment interest added another $2.5 million.

Defendants have appealed part of Judge Gants' Order claiming that they are still entitled to withhold certain "opinion" work product. Defendants' Petitions for Interlocutory Relief should be denied. It was well within Judge Gants' discretion to rule that the Plaintiffs are entitled to the withheld documents because: (1) the Defendants' analysis of the Plaintiffs' claims contained in the documents in question are central to this case; (2) Plaintiffs have a substantial need for the documents, and (3) they cannot obtain the equivalent elsewhere. See Order at 10-15, 23.[1]

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[1] Furthermore, Judge Gants separated documents into non-work product created before litigation commenced, and documents that constitute work product, but are still discoverable in the context of this case. Order at 10-12. Plaintiffs still contend that claims handling, including investigating, analyzing and settling them, is the business of insurers. As such, the purported "opinion work product" was prepared in the ordinary course of business and not in anticipation of litigation. Therefore, the documents that are the subject of the Defendants' Petitions do not constitute protected work product and should be produced. E.g., Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24, 25-26 (D. Mass. 1987)(ordering production of notes and statements transcribed by a representative of the defendant's insurer because investigation was in the ordinary course of business); Shotwell v. Winthrop Cmty. Hosp., 26 Mass. App. Ct. 1014, 1016 (1988) (Reports prepared "in the ordinary line of business and duty" for the purpose of gathering and using relevant information, while ultimately "useful to one or another party in case of future litigation," do not fall within the scope of Mass. R. Civ. P. 26(b)(3).

ARGUMENT

Denying access to relevant documents in discovery is the exception not the rule. It is for that reason that privileges are construed very narrowly.

> [P]rivileges diminish the evidence before the court, and contravene the fundamental principal that the public...has a right to every man's evidence. As such, they must be strictly construed, and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

Three Juveniles v. Commonwealth, 390 Mass. 357, 359-60 (1983) (internal quotations and citations omitted). By rule, access to work-product, which is technically not privileged, is withheld even less frequently. See Mass. R. Civ. P. 26(b)(3). The purpose of the work-product protection is to prevent counsel from piggybacking on the work of an adversary, thereby gaining an unfair advantage by not having to conduct their own analysis. See Ward v. Peabody, 380 Mass. 805, 817 (1980)(the work product doctrine "is intended to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties as he prepares for the contest.").

In this case, and similar cases involving unfair settlement practices, the withheld documents contain crucial factual evidence of whether the insurer's handled the underlying claims in bad faith. See, e.g.,

Clegg v. Butler, 424 Mass. 413, 414-16, 421-22 (1997) (in determining that the insurer violated G.L. c. 176D, § 3(9)(f), the Supreme Judicial Court relied upon information such as the insurer's investigations and surveillance of plaintiff, the insurer's review and evaluation of plaintiff's medical records, recommendations of investigators with respect to setting of reserves and insurer's internal analysis regarding liability). As such, allowing insurers to withhold this information in Chapter 176D cases would deprive the parties and the court of the evidence in the case. The legislature created a cause of action for failure to effectuate fair settlement; it simply cannot be the case that at the same time, plaintiffs are to be denied access to the very evidence that will prove their claim. Thus, Judge Gants properly ordered the Defendants to produce the withheld documents, including those that contained the Defendants' "opinions."

I. Opinion work product is discoverable where those opinions are the central issue in the case.

Judge Gants properly ordered Defendants to produce their purported opinion work product because the analysis and opinions of the insurers and those involved in making decisions with respect to settlement are not only at issue, but in fact are the issue in the case. See e.g., id.; see also Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 558-59, 566 n.14 (2001)(noting

that insurer's concession that it violated G.L. c. 176D, § 3(9)(f), was well warranted given its own records, including recommendations by the adjuster as to reserve amounts); Griffin v. Commercial Union Ins. Co., No. 934137, 1998 WL 1181744, at *12 (Mass. Super. Ct. July 21, 1998)(relying upon insurer's determination that liability could not be reasonably contested, analysis of special damages, conclusions of the insurer's physician regarding ongoing injury, and value placed on the claim by adjustor and insurer's attorney, to find willful violation of 93A and 176D).

When the Defendants' opinions are the issue in the case, Plaintiffs are entitled to discovery of that evidence. See Ward, 380 Mass. at 818 ("[W]hen the activities of counsel are inquired into because they are at issue in the action before the Court, there is cause for production of documents that deal with such activities, though they are 'work product.'") (quoting 4 Moore's Federal Practice par. 26.62[4], at 26-447 (2d ed. 1970); see also Holmgren v. State Farm Mut. Auto. Ins., 976 F.2d 573, 577 (9th Cir. 1992)("[T]he rule, [26(b)(3)], permits discovery when mental impressions are the pivotal issue in the current litigation and the need for the material is compelling.")(emphasis added); Smith v. Budget Rent a Car, No. DV-04-388, 2005 Mont. Dist. LEXIS 1182, at *25 (June 21, 2005)("By "directly at issue in the case" the mental impressions must

actually be the issue in the case.")(emphasis added); Shilhanek v. D-2 Trucking, Inc., No. DV-97-704, 2001 Mont. Dist. LEXIS 2568, at *24 (March 7, 2001)("[T]he Court finds in this bad faith case, where the issue is whether [the insurer] had a reasonable basis for ... engaging in bad faith settlement practices--all when liability was clear and admitted--[the insurer's] mental impressions are directly at issue").

Defendants contend that Judge Gants' analysis distorts the "at issue" doctrine by ordering the production of their opinion work product without a showing that they affirmatively waived the protection (Zurich Br. at 9), but in fact it is the Defendants who distort the ruling. The "at issue" doctrine, as described by the Defendants, is a rule of waiver, and as such, requires that the party claiming the privilege take some affirmative act placing the communications "at issue."[2] Here, Judge Gants did not apply the "at

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[2] See Darius v. City of Boston, 433 Mass 274, 284 (2001)(discussing "at issue" as doctrine of waiver) Sax v. Sax, 136 F.R.D. 542, 543-544 (D. Mass. 1991)(same); Dedham-Westwood Water Dist. v. Nat'l Union Fire Ins., No. 96-00044, 2000 Mass Super LEXIS 31, at *12 (Feb. 15, 2000)(same). Other cases relied upon by the Defendants are distinguishable because they involve claims by the insured where the issue is interpretation of the insurance contract, not bad faith in analyzing a third-party's claim. Dixie Mill Supply Co., Inc. v. Continental Cas. Co., 168 F.R.D. 554, 555, 558 (E.D. La. 1996)(claim by insured for failing to defend, distinguishing cases in which compelling need was shown for disclosure of work product); Bartlett v. State Farm Auto. Ins. Co., 206 F.R.D. 623, 629-30(S.D. Ind. 2002)(claim by insured for denial of claim, noting that

issue" doctrine of waiver. Instead, he applied the rule that a party may be required to disclose opinion work product "in extremely unusual circumstances." Order at 5, 12, quoting Reporter's Notes, Mass. R. Civ. Proc. 26. The proper question, as addressed in the Order, was not who placed the mental impressions "at issue," but whether the mental impressions are the issue in the case, thereby creating unusual circumstances. As Judge Gants explained, in a bad faith insurance settlement case, the mental impressions and opinions of the insurer's agents handling the claim are the issue in the case and are discoverable.[3] See Holmgren, 976 F.2d at 577; Smith, 2005 Mont. Dist. LEXIS, at *25; Shilhanek, 2001 Mont. Dist. LEXIS 2568, at *24.[4]

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plaintiff could obtain much of the requested information himself, including his own medical and employment history).

[3] Therefore, the Defendants' contention that the Court's reliance on Holmgren is misplaced because it fails to explain which party placed the mental impressions "at issue" is immaterial.

[4] Defendants improperly rely upon the Single Justice opinion in Guevara v. Medical Prof. Mutual Ins. Co., No. 03-J-486, 2003 WL 23718323 (Mass. App. Ct. Oct. 24. 2003) to support a different conclusion. AIGDC Br. at 4-6. In that very brief opinion, Judge Mason did not address whether opinion work product should be produced because it is central to the case. He simply ruled that there is no blanket exception to the work product doctrine when the documents sought were prepared in a case that had already concluded. Guevara, 2003 WL 23718323, at *1. The trial court's decision was vacated because the lower court should have analyzed whether the documents in question were prepared in anticipation of litigation and whether the plaintiff demonstrated a substantial need for them. Id. Judge

II. The claimed opinion work product was properly ordered to be disclosed because it is critical to Plaintiffs' case.

Plaintiffs have a substantial need for the Defendants' analysis of liability, strategy and reserves because, as stated above, that is what constitutes the evidence in this case. As stated by one court, and quoted by Judge Gants:

> Bad-faith actions against an insurer...can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming .... The "substantial equivalent" of this material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether [the insurer] acted reasonably.

Yurick v. Liberty Mut. Ins. Co., 201 F.R.D. 465, 473 n.13 (D. Ariz. 2001)(emphasis added); Order at 10-11.

Defendants do not dispute the fact that the Plaintiffs have a substantial need for the withheld documents, instead they argue that the Plaintiffs may obtain the substantial equivalent of the claims file by deposing the employees responsible for handling the Plaintiffs' underlying claim. Zurich's Br. at 3-7; AIGDC's Br. at 6-7. Judge Gants rejected this

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Gants did not apply a blanket exception based on the conclusion of the underlying personal injury action here, therefore Guevara is inapplicable.

assertion.[5] Without the written "diary," Plaintiffs will be denied the opportunity to refresh the recollection and to test the veracity of any of the witnesses. See Yurick, 201 F.R.D. at 473 n.13; Jones v. Nationwide Ins. Co., No. 3:98-CV-2108, 2000 U.S. Dist. LEXIS 18823, at *9 (M.D. Pa. July 20, 2000) (finding substantial need because a deposition on oral recollection alone in a bad faith case is insufficient without accompanying documentation). In short, as Judge Gants recognized, unless the documents are produced, each witness can testify without fear of being impeached. Order at 13.

This case is much different than those relied upon by the Defendants in which the various courts ruled that a party was not entitled to witness statements or investigatory memoranda compiled by their opponent because it could have conducted its own investigation, taken statements or deposed the same witnesses. Cf. Harris v. Steinberg, No. 93-13736, 1997 WL 89164, at *4 (Mass. Super., Feb. 10, 1997)(investigatory memoranda not ordered to be produced where plaintiff had not even attempted to

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[5] The Defendants' assertion is also disingenuous because this case was filed one year ago and Plaintiffs have not yet been able to take a single deposition. Zurich has forced Plaintiffs to reschedule a number of depositions and stalled in agreeing dates for others. A Motion for Sanctions is currently pending against AIGDC for its failure to appear at two scheduled depositions.

conduct his own investigation)[6]; Bondy v. Brophy, 124 F.R.D. 517, 518 (D. Mass. 1989)(involving investigatory memorandum compiled by plaintiff where defendant made no showing that she could not conduct her own investigation and/or depose the same witnesses); Poteau v. Normandy Farms Family Campgrounds, Inc., No. 9702128, 2000 WL 1765424, at *3 (Mass. Super., Aug. 1, 2000)(ordering production of some documents but not all letters and reports prepared by insurance investigator and experts where plaintiff made no showing that he could not conduct own investigation); see AIGDC's Br. at 6-7 (citing Dyson v. Janson, No. 0303462, 2004 WL 3091644 (Mass. Super. Dec. 8, 2004)(seeking transcript of interview with witness who had already been deposed); Levine v. Marshall, No. 95-1504-B, 1997 WL 416581 (Mass. Super. July 18, 1997)(seeking memoranda describing conversations with witnesses who could be deposed)).

In each of those cases, the discovering party was seeking their opponent's work product and analysis of the claims without conducting their own investigation.

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[6] Notably, Zurich ignores the observation by the Harris court that "[w]here a witness is unavailable or where contemporaneous statements have been made that cannot be reproduced, courts will often order the production of work product. Harris, 1997 WL 89164, at *4 (citing Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 343 (D. Mass. 1982). The cases relied upon by the Defendants support the Plaintiffs' position that because they cannot recreate the claims file through deposition testimony, those documents should be produced.

In this case, in contrast, the Defendants' analysis of the underlying claims and the reasons for their actions are the central issues and discovery is geared toward testing the reasonableness of their conduct, not as a means to highjack the work of defense counsel in this case or avoid conducting an investigation into the facts of the underlying personal injury case.

Additionally, as a practical matter, the Defendants' claims elevate form over substance. Judge Gants correctly noted that the claim representatives who created the documents, or the relevant document entries, would have to testify about the very opinions that they recorded in the withheld documents. Defendants have never argued, nor can they argue, that they would be able to object to questions regarding the representative's opinions and analysis because:

> [The claims representative's] state of mind is protected by no privilege, and his good faith and that of is employer is plainly relevant in an unfair claim settlement case. If his opinion work product in the claims file were not discoverable, the plaintiffs would be denied access to any writings he made prior to or contemporaneously with the settlement offer that may contradict or influence his deposition and trial testimony.

Order at 13. It simply makes no sense that a plaintiff could depose a witness about opinions that have been withheld, but never be able to test the accuracy of the response or refresh the witness' memory about events that occurred years before.

Requiring Defendants to produce the documents in question will not create a "doomsday" scenario as the Defendants claim. First, as Judge Gants stated:

> The insurer's evaluation of the facts would not be discoverable by the plaintiffs in the underlying tort litigation because the evaluation would not be admissible nor likely to lead to admissible evidence. In the underlying tort litigation, the insured, not the insurance company, is the defendant, and the insurance company's evaluation of the strength of the plaintiffs' case would not be admissible into evidence as a statement of a party opponent and would not be likely to lead to admissible evidence. In contrast, here, the insurance companies themselves are the defendants and their evaluation of the strength of the plaintiffs' case is a central issue in determining the reasonableness and good faith of their settlement offers. Indeed, this difference in the scope of discovery is one of the key reasons why trial courts generally sever the Chapter 93A/176D claims...from the tort claims brought against the insured defendant.

Order at 7-8.

Second, the insurer's analysis will not be discoverable in every unfair claims practice case, or provide an incentive for everyone dissatisfied with a claim decision to file suit to gain access to an insurer's files. In this sense, coverage disputes filed by the insured parties—such as Ring v. Commercial Union Ins. Co., 159 F.R.D. 653 (M.D.N.C. 1995), relied upon by Defendants— are distinguishable from those filed by third-parties, such as this case. In the first instance, claims filed by insureds are contract disputes in which the insurer failed to provide a benefit under the insurance agreement. See, e.g., id.

at 654. To the contrary, the very issue in third-party unfair settlement practice claims is the analysis of the claim itself. See Clegg, 424 Mass. at 414-16, 421-22 (insurer's handling of claim, including investigation, review and evaluation, and internal analysis of liability all key factors). The written analysis of the claim is directly relevant to the latter case, but much less so in the former.[7]

Lastly, Defendants' contention that compelling production of claimed opinion work product in these types of cases will discourage claim representatives from recording their opinions (Zurich Br. at 14-15) is pure speculation. If anything, the threat of unfair settlement practice claims and the fact that insurers could be exonerated by notes demonstrating their good faith analysis and actions, should serve as an incentive to create more and better notes, not fewer. See, e.g., Platt v. Superior Ct. of San Diego County, 263 Cal. Rptr. 32, 40 (Cal. Ct. App. 1989)("An attorney apprehensive about the risk of a malpractice suit will, if anything, produce more copious notes and writings to protect himself rather than be 'chilled' from

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[7] Also, contrary to Defendants' implication that a mere allegation of bad faith will open insurers up to all discovery (see Zurich Br. at 14),Zurich's document responses disclose that beginning in April, 2002 its adjuster continually recommended that the reserve be raised to the policy limit, but that Zurich did not do so until late 2003 - five months before it offered a $2 million settlement; thus, this case is well beyond the stage of "mere allegations."

documenting his thoughts, ideas, and research."), rev. denied, depublished by, 788 P.2d 1154 (Cal. 1990), rev. dismissed by, remanded by 795 P.2d 783 (Cal. 1990). Therefore, there is no reason to prevent discovery of the claimed opinion work product.

CONCLUSION

Because (1) the Defendants' analysis of the underlying claims constitute the central issue in this case, (2) the analysis is critical to Plaintiffs' case, and (3) they have no way to obtain the substantial equivalent through other means, Judge Gants did not abuse his discretion in ordering the production of the withheld documents. Accordingly, the Defendants' Petitions for Interlocutory Review should be denied.

CERTIFICATE OF SERVICE

I, hereby certify that I have this day served the above Opposition on the following counsel by hand:

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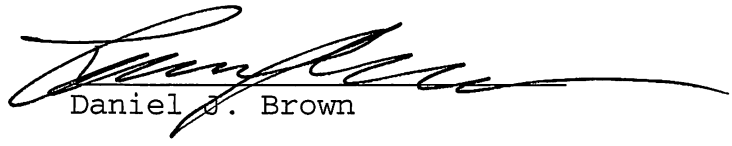

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DATED: March 1, 2006