



Insurance Coverage Fundamentals and Hot Topics

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REPRESENTING INSUREDS IN DISPUTED PROPERTY/FIRE LOSS CLAIMS

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I. INTRODUCTION

This chapter will focus on the post loss procedures an insured and their attorney can expect to go through when presenting a contested claim for a loss under a homeowner's property insurance policy. Most claims for coverage under homeowner's policies are paid by the insurer in a prompt and reasonable manner. Normally, the insured will not need the service of an attorney when presenting their claim.

However, there are times when the insurer decides to contest the insured's claim. In these circumstances the insured is well advised to have the assistance of an attorney. This may occur in situations where the insurer believes the claim is excluded from coverage under the terms of the policy, the insurer requests or requires an intensive investigation in order to determine if the claim is covered, the insurer believes that the amount of the loss is much less than the amount claimed by the insured, or the insurer believes that the insured has engaged in fraud in presenting the claim.

Set forth below is a description of the claim procedures and some of the legal issues that the insured's attorney can expect to confront when representing an insured in a contested claim under a homeowner's policy, as well as suggestions for assisting the insured through the claims process.

II. THE CLIENT

Insureds normally contact an attorney for assistance regarding a claim after they are well into the claim process. Typically they are feeling that they are not getting a fair shake from their insurer. Insureds may call an attorney after their claim has been denied, after they have been instructed that they must appear before the insurer's attorney for an Examination Under Oath, or when they simply get the sense that they are in an adversarial relationship with the adjuster for the insurer.

The attorney should meet with the insured as soon as possible, and should instruct the insured to have no further contact with representatives of the insurer without the attorney being present. Absent unusual circumstances, once the insured has retained the attorney, all correspondence and communication with the insurer should go through the attorney's office. Some clients and some insurance adjusters may need extra reminders in this regard.

The attorney should gather as much information as they can from the insured about why

there has been a problem with the claim. Insureds will often profess to have no idea why there is a problem. They may feel that they are simply getting an unjustified runaround from their insurer for no apparent reason.

Certain areas should be explored with the insured that may provide insight into why the insurer is contesting the claim. For example, does the client have an excessive history of homeowners policy losses? Was the client having financial difficulties at the time of the loss? Did the client take out the policy or ask for a significant increase in coverage shortly before the loss occurred? Does the client have difficulty verifying where they were and what they were doing at the time a theft or fire loss occurred? Do the values the client has assigned to their lost or damaged property seem unusually high? Does the client have a difficult time verifying that they actually owned property listed on their claim form through purchase records, photographs or witnesses who saw the property in the insured's home before the loss? Yes answers to any of these questions may indicate that there are red flags about the claim that have caused the insurer to act more aggressively in the claim process.

III. THE ADJUSTER

If the insurer has not retained an attorney to handle the claim, the insured's attorney should promptly contact the insurer's claims adjuster. Some adjusters will be very forthcoming in explaining why there have been difficulties in adjusting the claim. They may be relieved that the insured has retained an attorney because they believe that they will be able to work more effectively with the attorney. The insured's attorney should do all they can to assist such adjusters in completing the claims process.

However, many adjusters will be very close-mouthed about the claim. They won't let the insured's attorney know what the problems are. They may say the claim is simply going through the normal claim adjustment process. When pressed for details they will often say that the claim is "under investigation" but won't tell you what the investigation is about. The insured's attorney should make it clear to such adjusters that they expect the claim to be processed promptly and they want to be notified if there is anything the insured can do to help move the process forward. In

some cases this communication should be put in writing so that there is a paper trail that verifies that the insured has done their best to cooperate with the adjuster. If the adjuster requests any information or documentation about the claim, this should be produced as quickly as possible. The insured's attorney should do their best to make the record clear that any delays in the processing of the claim are the responsibility of the insurer's adjuster, and not the insured.

IV. THE POLICY

The insured's attorney should always obtain a complete copy of the insured's homeowner's policy that was in effect at the time of the loss. The insured may have all or parts of the policy. Regardless, the attorney should ask the adjuster or attorney for the insurer for a complete certified or specimen copy of the insured's policy. This should include the declarations page of the policy, the policy itself, and any endorsements to the policy listed on the declarations page. The attorney should also request a copy of any written applications submitted by the insured before the policy was issued.

The attorney should carefully review the policy with the insured. They should identify all the relevant claim time deadlines, and all of the insured's duties in presenting the claim. They should look to make sure that the insured has presented claims to the insurer under all parts of the policy that may provide coverage for the loss. For example, most homeowner's policies provide "loss of use" coverage in addition to property damage coverage. Under loss of use coverage the insured can receive compensation for the extra living expenses they incur when they have to move out of their house due to a loss.

The policy should also be reviewed for any policy exclusions or limitations that may affect the insured's claim. There may be disputes about whether particular exclusions apply to the claim or there may be an issue as to whether certain policy limitations will reduce the amount of coverage available to the insured. For example, many homeowner policies set limits on the coverage for the loss of cash, guns or jewelry.

If there are any questions about the coverages that are available in the policy, or about the responsibilities of the insured in presenting the claim, the insured should contact the adjuster for

further instructions and clarification. It is a good idea to write to the adjuster and say: "Please send me a written explanation as to exactly what we have to do and when we have to do it in order to properly present my client's claim for their loss." Ask the adjuster to identify the specific parts of the policy that provide coverage for the insured's loss, the policy limitations and exclusions that might apply to the claim, and the parts of the policy that identify the insured's rights and responsibilities in presenting the claim. However, the insured's attorneys should not rely completely on the adjuster's representations in these regards. It must be remembered that there is an adversarial relationship between the adjuster and the insured. Regardless, it is helpful to ask the adjuster for this information because it will give the insured a roadmap for presenting their claim. Also, the insurer will be hard pressed to argue that a claim has not been properly presented if the insured has followed all of the adjuster's directions in presenting the claim.

Issues may arise during the claim process as to the meaning or legal significance of various parts of the insured's policy. In most circumstances, the issues the insured's attorney will confront regarding specific policy provisions have been litigated and ruled on by appellate courts somewhere in the United States. Most homeowner's policies are made up of standard boiler plate policy provisions that are in policies issued by insurers throughout the country. An excellent resource for researching how courts have interpreted specific policy provisions is Miller's Standard Insurance Policies Annotated. Miller's identifies the standard homeowner's policy forms, and provides citations to cases that have ruled on issues related to specific parts of the policy forms. This publication is available at the Multnomah County Courthouse Law Library.

V. PRESENTING THE CLAIM

The insured's attorney should determine what steps in the claim process have already been accomplished when the attorney is first retained by the insured. The attorney should ask for this information from both the insured and the adjuster. If there has been any written communication between the parties about the claim the attorney should ask for copies from the adjuster. A copy of any recorded statements given by the insured about the claim should be obtained from the adjuster and reviewed.

As indicated above, the attorney should ask the adjuster exactly what is expected of the insured in presenting the claim. The attorney should assist the insured in completing whatever steps are necessary to comply with the adjuster's instructions. The attorney should review all documents that are presented to the insurer to support the claim.

Most insurers will expect the insured to fill out and present a claim form that specifically identifies each particular item that is part of the loss, where and when it was purchased, and the amount the insured is claiming for the loss of the item. This can be a very time consuming and difficult process for the insured. A one-step-at-a-time approach is usually the most effective.

First, the insured should simply make a list of every single item that was lost, stolen or destroyed as a result of the loss. Going through the home one room at a time can be helpful in recalling items that have been lost. Reviewing photographs that were taken in the home before the loss may help the insured recall what was there once but is now gone. Insureds should be encouraged to prepare a complete list of lost items the first time they present a claim inventory to the insurer. The insured can always submit a subsequent claim inventory if they think of other lost items later. However, supplemental claims may lead to delays and complications in the claim process, and may arouse suspicions by the insurer that the insured is trying to pad their claim.

Insureds who have submitted a list of stolen property in a report to the police shortly after a theft loss should compare the police report inventory to the insurance claim inventory before it is presented to the insurer. If the insured has thought of additional items that are missing after sending in the police inventory, and wants to include those items on their insurance claim inventory, they should send a supplementary inventory to the police. This will help prevent the insurer from alleging that the insured has fraudulently padded their claim by adding items to their insurance claim inventory that were not reported to the police.

Next, the insured needs to determine the amount to claim for each item that was lost. Most homeowner's policies now include replacement cost coverage. Generally, adjusters will ask the insured to determine how much it will cost to replace a lost item, and then list that amount on the claim form. The adjuster will then perform the task of determining the depreciated value of that item at the time of the loss. Insureds can review web sites and catalogues, or go to stores to

determine how much it will cost to replace a lost item. Attorneys should remind insureds that they are to determine how much it will cost to replace a lost item with another item of "like kind and quality." Any attempt by the insured to set a replacement value for a lost item that is intentionally inflated could lead to a denial of the insured's claim. For example, if an insured makes a claim for a lost 16 inch black and white television and cites the purchase price for a new 24 inch color television, the insurer may very well allege that the insured is intentionally trying to pad their claim. This should be avoided. An excellent analysis of legal issues that can arise in presenting claims under replacement coverage policies can be found in an American Law Review article entitled Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property, 1 ALR 5th 817.

Next, the insured should gather whatever documentation or other evidence they can come up with to help prove that they owned each item listed on their claim form. This is especially true if there is any indication that the insurer is questioning whether the insured actually possessed any particular items listed on the claim form. The insured should search for any documents that may verify the purchase of a questioned item. This may include sales receipts, warranty information, instruction manuals, cancelled checks or credit card records. Family photographs taken in the home may show the item. Family, friends or neighbors who may have seen the item in the insured's home should be consulted. It is not mandatory that insureds produce such proof of ownership in order to be entitled to make a claim for the loss of a particular item. However, the more independent evidence the insured can present to verify that they owned an item, the less the insurer will be able to allege that the insured has made a claim for an item that did not exist or that the insured did not own.

In most circumstances the insurer will require the insured to fill out and submit a sworn and notarized Proof of Loss form. The Proof of Loss form asks for basic information about the loss, including the circumstances of the loss and the amount the insured is claiming for the loss. The attorney should assist the insured in filing out and presenting the Proof of Loss form. Documents that verify or explain the amount of the insured's claim can and should be attached to the form. Policies often have time deadlines within which the Proof of Loss must be submitted. The time deadlines should be strictly complied with if possible. If an extension of time is needed this should

be checked with the insurer's adjuster or attorney and confirmed in writing. If a dispute arises as to whether the Proof of Loss was filled out properly or submitted in a timely manner, the insured's attorney can cite *Sutton v. Fire Insurance Exch.*, 265 Or 322, 509 P2d 418 (1973), wherein the court held that "substantial compliance" with a policy's Proof of Loss requirement is sufficient to permit an action on a policy. See also *Parks v. Farmers Ins. Co.*, 214 Or. App. 1, 162 P.2d 1099 (2007) (proof of loss is sufficient only if insurer can ascertain its obligations through a reasonable investigation.)

It is very important to emphasize to the insured client that they must be scrupulously honest in regard to all information they provide to the insurer while presenting their claim. Most homeowner's policies state in the Conditions Section that any fraud or false swearing by the insured during the claims process may be grounds for a complete denial of the claim. Insurers often take the position that any one intentionally false statement by the insured about their claim will allow the insured to deny the entire claim. They will cite a footnote in *Hendrickson v. Home*, 237 Or 539, 392 P2d 324 (1964), wherein the court said: "A misrepresentation as to a single material fact will forfeit the entire insurance contract." Insurers may argue that an intentionally false statement about one \$10 hammer in an otherwise valid \$100,000 fire loss claim is grounds for denial of the entire claim. However, at trial, the insured must prove that it relied to its detriment upon the insured's misrepresentations in order to defeat the insured's claim. *Eslamizar v. American States Ins. Co.*, 134 Or. App. 138, 894 P.2d 1195 (1995). Hence, the insured's lawyer should strongly encourage their client to be scrupulously honest in all of their communications with their insurer, even if they feel they are being manipulated or otherwise treated unfairly by the insurer.

Generally, once the claim inventory and Proof of Loss form have been presented to the insurer the ball is in the insurer's court regarding further adjustment of the claim. However, the insured's attorney should frequently ask the adjuster if there is anything else that they need to provide the insurer so that the adjuster can move the claim adjustment process forward as quickly as possible.

VI. THE EXAMINATION UNDER OATH

If an insurer is going to contest a claim, they will often hire an attorney to take an Examination Under Oath from the insured and direct a more thorough investigation of the claim.

Most homeowner's policies give the insurer the right to take an Examination Under Oath ("EUO") from the insured. This is a process wherein the insurer's attorney meets with the insured and asks questions about the claim before a court reporter and while the insured is under oath. The attorney will often ask the insured to bring a long laundry list of documents to the EUO. These documents are marked as exhibits and the attorney often asks the insured questions about the documents.

The list of documents requested often includes such things as tax returns, bank statements, credit card receipts, telephone records, credit reports, and just about anything else the insurer can think of that will provide information about the circumstances of the loss and the insured's financial condition at the time of the loss. More recently, insurers are starting to ask their insureds to bring their laptop computers and cell phones to the Examination Under Oath. The insurers then have forensic experts review material stored on these devices in order to see if they can find anything that will support a denial or limitation of the insured's claim.

Insureds almost uniformly feel that the insurer is being extremely heavy handed and demanding in requesting all of this material. Collecting and organizing the requested documents can be extremely burdensome for the insured. Providing their laptops and cell phone for examination can seem very personally intrusive.

However, an insured's failure to produce the requested documents or refusal to participate in the EUO may constitute a breach of the insurance contract, and may provide a basis for denial of the claim. See Herron v. Millers Mutual Ins. Co., 185 F. Supp 851 (D. Or. 1960). An excellent analysis of the rights and responsibilities of the insured in the EUO process can be found in an American Law Review article entitled Requirements Under Property Insurance Policy That Insured Submit to Examination Under Oath As To Loss, 16 ALR 5th 412.

The insured's attorney should help prepare and organize all the material that is going to be presented at the EUO. The attorney should prepare the insured for the EUO in the same manner

they would prepare the insured for a deposition. The attorney should strongly emphasize again that it is extremely important that the insured not make any false or misleading statements during the EUO. If there is anything that the insured previously said during the claim process that is not completely honest and accurate, the insured should set the record straight during the EUO.

The attorney should be present at the insured's EUO. The attorney should ask that his client have an opportunity to review the EUO transcript and all documents that are made exhibits after the EUO has been completed. Most insurers will comply with this request. The insured and the attorney should carefully review the EUO transcript for honesty and accuracy before signing and returning it to the insurer. Any corrections of the transcript should be made in writing.

VII. THE INVESTIGATION

Insurers will typically continue their investigation of the claim following the EUO. They will often report that there are matters that came up during the EUO that need to be looked into. They will often be very non-specific about what exactly these matters are. The post EUO investigation can take weeks or even months. This can be a very frustrating time period for insureds.

During this time period the insured's attorney should ask the insurer to provide periodic updates regarding the status of the investigation. OR ADC 936-080-0235(3) requires that the insurer notify the insured at least every 45 days of the need for additional time to complete its investigation and the reason why additional time is needed. The insured's attorney should emphasize that they are available to provide the insurer whatever assistance they can so that the investigation process can move forward as quickly as possible.

The insured and their attorney can also use this time period to conduct their own investigation or gather additional information to support the claim. By this time in the claim process it is often more clear what the issues are that have led the insurer to have concerns about the claim. For example, the insurer may be suggesting that the insured has intentionally inflated the amount it will cost to repair fire damage to their house. The insured might consider obtaining a second repair bid from a reputable contractor to support their claim. Or the insurer may be

suggesting that the insured burglarized their own house to create a fraudulent theft loss claim. The insured should use this time to gather whatever evidence is available to verify their whereabouts at the time of the loss.

VIII. CLAIM DENIAL

If the insurer decides to deny the insured's claim, they must notify the insured in writing, and must identify the specific policy provision, condition or exclusion which the insurer is relying on to justify the denial. OR ADC 836-080-0235(1). Insurers will typically send a certified letter to both the insured and the insured's attorney to give notice that the claim has been denied.

Insurers will seldom provide detailed information in their denial letters about why they decided to deny the claim. The letters often state, for example, that the claim is being denied because the insured has made intentionally false statements in the claim process. However, the letters don't specify which of the hundreds of statements made by the insured during the claim process the insurer considers to be fraudulent.

In these circumstances, it is important for the insured's attorney to request and/or demand that the insurer provide more specific information as to the basis for the denial of the claim. It is very difficult for the insured and their attorney to evaluate whether the denial is justified without such specific information. However, insurers are often very reluctant to give specific information, presumably for fear that it will tip their hand if litigation arises as a result of the denial. The insured's attorney should emphasize in their communication with the insurer that litigation of the denial may become much more likely if specific information is not provided, particularly if formal litigation will be the only way for the insured to obtain a full explanation for the insurer's decision to deny the claim.

IX. APPRAISAL AND FORMAL LITIGATION

In some circumstances the insurer will agree to pay for an insured's claim, but in an amount that is far less than the insured believes they are entitled to receive for the claim. For example, an insurer may say that they are willing to pay \$50,000 to repair the fire damage to the insured's house,

when contractors hired by the insured say that it will cost at least \$75,000 to properly repair the damage.

In these circumstances, the parties may resolve their dispute through an appraisal process described in ORS 742.232. In this process each side selects an appraiser and the two appraisers select a neutral umpire. These three persons then determine the amount the insured is entitled to receive for their loss. The appraisal process is one that should be considered by the insured and their attorney. It provides a relatively quick and inexpensive avenue for resolution of this kind of claim dispute.

However, the same dispute can also be resolved through formal litigation in the court system. This is obviously a slower and more expensive forum to fight the issue with the insurer. However, the insured is entitled to an award of attorney fees in the court system under ORS 742.061 if the court determines that the insured is entitled to receive more for their claim than the best tender made by the insurer. Insurers are well aware that they will not only have to pay for the insured's claim, but will also have to pay for the insured's attorney fees if the insured prevails in the court system. This provides extra motivation for the insurer to come forward promptly with a fair offer for resolution of the insured's claim.

It should be noted that the appraisal process described in ORS 742.232 has been determined to be unconstitutional to the extent that it makes appraisal of claim dispute mandatory. In Molodyh v. Truck Insurance Exchange, 304 Or 290, 744 P2d 992 (1987), the court held that the mandatory nature of this statute (formerly numbered ORS 743.648) violates the insured's constitutional right to resolve their claim dispute through a jury trial. The court ruled that if the insured does not demand an appraisal pursuant to the statute, then the insured retains their right to have a jury trial to resolve the claim dispute. However, if the insured demands the appraisal, then they will be bound by the appraisal award.

Accordingly, the insured and their attorney will first need to decide whether they want to resolve the claim dispute through appraisal or through formal litigation. If they choose to pursue formal litigation, they should notify the insurer in writing that they are not willing to participate in the appraisal process. This is particularly true if the insurer has indicated that they want to do the

appraisal.

Many homeowner's policy claim disputes cannot be resolved through appraisal. For example, issues such as whether the policy was in effect at the time of the loss, the applicability of policy exclusions to the loss, and whether the insured engaged in fraud in obtaining their policy or in presenting their claim must be resolved through formal litigation in the court system.

Insureds who decide to file a lawsuit against their insurer need to include a breach of contract claim and a prayer for money damages in the complaint. Otherwise, they will not be entitled to recover their attorney fees pursuant to ORS 742.061 if they prevail in the action. An insured's lawsuit that only asks for a declaratory judgment regarding the coverages provided by the policy will not give rise to an award of attorney fees. See McGraw v. Gwinner, 282 Or 393, 578 P2d 1250 (1979).

On some occasions an insurer may initiate a declaratory judgment action against the insured to resolve the claim dispute. Insurers may want to fire the first shot in the court, particularly if they think the insured plans to file suit. If the insurer files a declaratory judgment action, the insured's attorney should be sure to include a counterclaim for breach of contract in their responsive pleading. This will preserve the insured's right to recover attorney fees if the insured prevails in the litigation of the claim dispute. See Hardware Mut. Cas. v. Farmers Ins., 256 Or 599, 474 P2d 316 (1970).

H

Court of Appeals of Oregon.
 UNITED PACIFIC INSURANCE COMPANY, a
 Washington corporation, Respondent,
 v.
 Anthony R. TRACHSEL, Appellant.

83-1759C; CA A37573.
 Argued and Submitted Nov. 20, 1986.
 Decided Jan. 28, 1987.
 Reconsideration Denied March 13, 1987.

Insurer sought declaratory judgment that it owed insured nothing under fire policy, contending that insured breached policy by intentionally starting fire. Upon jury verdict, the Circuit Court, Washington County, Alan C. Bonebrake, J., entered judgment for insurer, and insured appealed. The Court of Appeals, Warren, J., held that: (1) evidence was sufficient to establish that documents prepared by fire cause expert were prepared in anticipation of litigation, and (2) insured failed to make adequate showing of substantial need to require production of documents.

Affirmed.

West Headnotes

[1] Pretrial Procedure 307A ↪406

307A Pretrial Procedure
 307AII Depositions and Discovery
 307AII(E) Production of Documents and
 Things and Entry on Land
 307AII(E)4 Proceedings
 307Ak404 Affidavits and Showing
 307Ak406 k. Privilege. Most Cited
 Cases

Evidence supported finding that documents prepared by insurer's fire cause expert constituted work product of attorney prepared in anticipation of litigation, and thus were not discoverable absent showing of substantial need and inability to obtain

substantial equivalent without undue hardship; insurer had been informed by fire marshall prior to retention of fire cause expert that fire had been intentionally set, providing basis for insurer to believe that denial of claim and litigation were likely. Rules Civ.Proc., Rule 36, subd. B(3).

[2] Pretrial Procedure 307A ↪379

307A Pretrial Procedure
 307AII Depositions and Discovery
 307AII(E) Production of Documents and
 Things and Entry on Land
 307AII(E)3 Particular Documents or
 Things
 307Ak379 k. Experts' Reports; Appraisals. Most Cited Cases

Insured failed to establish substantial need for documents prepared by insurer's fire cause expert regarding truck that was destroyed by fire, and failed to establish inability to obtain equivalent of documents without undue hardship necessary to compel insurer's production of documents where insurer sold truck only after consultation with insured and after securing insured's approval, and where insurer furnished insured with fire marshall's investigation reports. Rules Civ.Proc., Rule 36, subd. B(3).

****1060 *401** J. Michael Alexander, Salem, argued the cause for appellant. With him on briefs was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Thomas D. Adams, Portland, argued the cause for respondent. On brief were I. Franklin Hunsaker, Douglas G. Houser, Dianne K. Ericsson and Bullivant, Houser, Bailey, Hanna, Pendergrass, Hoffman, O'Connell & Goyak, Portland.

Before BUTTLER, P.J., and WARREN and ROSSMAN, JJ.

*403 WARREN, Judge.

United Pacific Insurance Co. brought this action, seeking, *inter alia*, a declaratory judgment that it owes defendant nothing under its fire insurance policy, contending that defendant breached the policy by intentionally starting a fire which damaged his property. The jury agreed and returned a verdict in favor of plaintiff. Defendant appeals, contending that the trial court erred in failing to compel the production of all documents concerning an investigation made by a fire cause expert retained by plaintiff. We affirm.

The fire, which damaged defendant's barn and truck, occurred on June 3, 1983. The county fire marshall investigated the fire on that day and concluded that it had been intentionally set. He informed plaintiff of his opinion. On June 6, plaintiff retained a fire cause expert to investigate the fire. Before the completion of that investigation, plaintiff paid defendant \$18,000, representing the claimed loss to defendant's truck. After plaintiff paid the truck claim, defendant made a claim for damage to the building. The fire cause expert concurred with the fire marshall's conclusion that the fire was not accidental. Thereafter, plaintiff denied the claim for the building and brought this action for declaratory relief and reimbursement for the amount paid on the truck claim.

Before trial, defendant filed a motion to produce all documents in plaintiff's possession concerning any examination of the damaged truck. Plaintiff refused, contending that such documents were protected by the attorney-client privilege^{FN1} and the work product rule. The trial court denied defendant's motion.

FN1. The attorney-client privilege is stated in OEC 503(2):

“(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal ser-

vices to the client:

“(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer[.]”

Because we conclude that the documents are protected by the work product rule, we need not address whether the attorney-client privilege applies to them as well.

Oregon's work product rule is stated in ORCP 36 B(3):

****1061** “Subject to the provisions of Rule 44, a party may obtain *404 discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an 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 such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

The rule protects only those things which are prepared in “anticipation of litigation” and not those prepared in the regular course of business. *Brink et ux v. Multnomah County*, 224 Or. 507, 517, 356 P.2d 536 (1960). Investigation reports prepared by or for an insurer may fall into either category depending on the purpose of the investigation disclosed by the evidence.

[1] Before plaintiff's retention of a fire cause expert, the fire marshall had informed plaintiff that the fire had been intentionally set. At that point, the evidence provided a basis for plaintiff to believe that denial of the claim and litigation were likely. In ruling on defendant's request for production, the trial court could believe that the investigation had shifted from one in the ordinary course of business

to one in anticipation of litigation.^{FN2} See *Ritrovato v. Hartford Ins. Group*, 88 Misc.2d 928, 390 N.Y.S.2d 504 (1976). Consequently, the trial court did not err in concluding that the material was privileged under ORCP 36 B(3) and discoverable only upon a showing that defendant has "substantial need of the materials" and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." See ORCP 36 B(3).

FN2. Defendant argues that, because plaintiff paid the claim for the loss of the truck after the fire cause expert's investigation began, the investigation could not have been in anticipation of litigation. Although that argument could have been accepted by the trial court, it was not. The trial court apparently accepted plaintiff's explanation that the payment was made in error.

[2] Defendant contends that he has made the statutory showing of substantial need because plaintiff, after paying the claim, sold the truck and thus eliminated all means by which defendant could obtain the substantial equivalent of the requested documents. We disagree. The representations made to the trial court were that defendant had retained counsel *405 before the truck was sold. Plaintiff sold the truck only after consultation with defendant and after securing defendant's approval. Plaintiff furnished defendant with the fire marshall's investigation reports. Given those representations to the trial court, which defendant does not contest, we conclude that it was not an abuse of discretion to refuse to compel the production of the documents. See *Farmers Ins. v. Hansen*, 46 Or.App. 377, 380, 611 P.2d 696 (1980).

Affirmed.

Or.App., 1987.
United Pacific Ins. Co. v. Trachsel
83 Or.App. 401, 731 P.2d 1059

END OF DOCUMENT

Not Reported in F.Supp.2d, 2010 WL 786016 (W.D.Wash.)
(Cite as: 2010 WL 786016 (W.D.Wash.))

H

Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court, W.D. Washington,
at Seattle.
Sherman BRONSINK and Dagmar Friess, husband
and wife, Plaintiffs,
v.
ALLIED PROPERTY AND CASUALTY INSUR-
ANCE, et al., Defendants.

No. 09-751 MJP.
March 4, 2010.

Bruce A. Winchell, Gretchen G. Salazar, Mills
Meyers Swartling, Seattle, WA, for Plaintiffs.

Michael Simpson Rogers, Danielle M. Evans, Reed
McClure, Seattle, WA, for Defendants.

ORDER ON AMENDED MOTION TO COMPEL
RE DOCUMENTS WITHHELD ON THE BASIS
OF PRIVILEGE OR WORK PRODUCT
MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Plaintiffs' amended motion to compel production of documents withheld on the basis of privilege or work product. (Dkt. No. 45.) The above-entitled Court having reviewed and received:

1. Plaintiffs' Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 45.)
2. Defendants' Response to the Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 57.)
3. Reply in Support of Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 69.)

And all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that Plaintiffs' Motion is GRANTED.

Background

On June 9, 2008, Plaintiff Sherman Bronsink's ("Bronsink") commercial property burned. (Dkt. No. 45 at 1.) He filed an insurance claim under his homeowner's policy, held by Depositors. (*Id.*) Within two weeks Depositors had engaged its "Special Investigations Unit" to investigate. (*Id.* at 2.) The special investigator, Chris Gormley, contacted "panel attorney" Daniel Thenell on February 6, 2009. (*Id.* at 3.) Thenell agreed to assist with the claim. He also conducted Examinations Under Oath ("EUO") of Sherman Bronsink and his wife, Dagmar Friess, on March 26, 2009. (*Id.*) On April 9, 2009, Thenell sent a letter to Bronsink indicating that Depositors was continuing its investigation and that "no coverage determination has been made." (*Id.*)

On May 11, 2009, Bronsink commenced the litigation. (*Id.* at 4.) At that time, Michael Rogers of Reed McClure represented Depositors. (*Id.*) In the initial disclosure and answers to interrogatories, Depositors describes Thenell as an "attorney who assisted with claims investigation." (Dkt No. 45, Ex. C at 2, Ex. D at 4.) In response to requests for production, Depositors has withheld 91 documents from Thenell's file on the basis of attorney-client privilege or work product protection. Depositors has also withheld seven documents from the Depositors claim file on the basis of attorney-client privilege and work product, six of which were communications to or from Thenell. Bronsink now seeks production of all of these documents.

Analysis

In a diversity case, the court must apply state law to substantive issues and federal law to procedural issues. *Erte R.R. Co. v. Tompkins*, 304 U.S. 64,

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58 S.Ct. 817, 82 L.Ed. 1188 (1938). The attorney-client privilege is a substantive issue and must be interpreted using the law of the state. *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666 (W.D.Wash.2007). Work product is procedural and governed by federal law. *Id.*

A. Attorney-Client Privilege

Bronsink argues that the privilege does not apply to Thenell because he was acting in the role of a claims adjuster or investigator and was not necessary to the provision of legal advice. "A communication is not privileged simply because it is made by or to a person who happens to be a lawyer." *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir.1977). Attorneys that act as claims adjusters or claims managers cannot later claim attorney-client privilege for that work. *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D.Minn.1986); see also *Schmidt v. Cal. State Auto. Ass'n*, 127 F.R.D. 182, 183 (D.Nev.1989); *HSS Enter., LCC v. Amco Ins. Co.*, No. 06-1485, 2008 WL 163669, at *3 (W.D.Wash. Jan.14, 2008).

*2 Depositors argues that Thenell served as an attorney and states, "while [he] questioned plaintiffs at their examinations under oath and gave advice concerning the investigation, this does not make him an adjuster." (Dkt. No. 57 at 5-6.) The declarations of Thenell and Gormley state that Thenell did provide legal advice, but fail to provide detail. (Decls. Thenell ¶ 3, Gormley ¶ 6.) In the initial disclosures and the answers to interrogatories, Depositors describe Thenell as an "attorney who assisted with claims investigation." (Dkt No. 45, Ex. C at 2, Ex. D at 4.) The amended privilege log also fails to provide more specifics about Thenell's role in each of the documents and communications. (Rogers Decl. Ex. A.) Depositors offers no specific evidence of Thenell's role and Depositors' own characterization of Thenell is inconsistent.

A third party may claim attorney-client privilege if that third party is an agent of the attorney or the client and they are essential to the giving of legal advice. See *State v. Aquino Cervantes*, 88

Wash.App. 699, 707, 945 P.2d 767 (1997); *State v. Gibson*, 3 Wash.App. 596, 599, 476 P.2d 727 (1970); *United States v. Kovel*, 296 F.2d 918, 920 (2nd Cir.1961). A party claiming the privilege has the burden to establish the privilege exists. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wash.App. 309, 332, 111 P.3d 866 (2005). "To meet this burden, a party must demonstrate that its documents adhere to the essential elements of the attorney-client privilege adopted by this court." *In Re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir.1992). An attorney acting as a claims adjuster, and not as legal advisor, could still claim the privilege if that attorney was an agent necessary for the provision of legal advice. The record reflects that Thenell likely was an agent of Depositors or its attorney. However, even if Thenell served as an agent of the attorney or client, the record does not demonstrate that the withheld documents and communications were necessary for the provision of legal advice. Without some evidence to support these propositions, the withheld documents and communications cannot be protected by privilege. The declarations and privilege log do not adequately support that Thenell was necessary to the provision of legal advice such that the privilege would apply.

The Court orders Depositors to disclose documents withheld on the basis of attorney client privilege because Depositors has failed to demonstrate that the withheld documents and communications are privileged.

B. Work Product

A party asserting work product privilege must show that the materials withheld are: (1) documents and tangible things; (2) prepared in anticipation of litigation; and (3) the materials were prepared by or for the party or attorney asserting the privilege. *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D.Cal.2003). In the insurance context, materials prepared as part of claims investigation are generally not considered work product due to the industry's need to investigate claims. Such materials are part of the ordinary course of business unless

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there is a sufficiently concrete connection between the investigation and potential litigation. *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 659 (S.D.Ind.1991); see *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C.1988).

*3 Normally an insurer has to deny the claim before a reasonable threat of litigation may arise. *Id.* "However, if the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate." *Id.* (citing *Binks Mfg. Co. v. Nat. Presto Indus. Inc.*, 709 F.2d 1109, 1119 (7th Cir.1983)). Further, "even after a claim is denied, reports of investigations filed thereafter which contain prior investigations or evaluations, or are merely a continuation of the initial routine investigation, may not be labeled as work product." *APL Corp. v. Aetna Cas. & Sur. Co.*, 91 F.R.D. 10, 14 (D.Md.1980).

The only disputed element here is whether the materials were prepared in anticipation of litigation. Bronsink asserts that the withheld documents were produced in the ordinary course of business and not in anticipation of litigation. Depositors makes no showing that the withheld documents were prepared in anticipation of litigation. It fails to answer this threshold question and focuses instead on Bronsink's burden to show compelling need sufficient to overcome protection. But a plaintiff only bears that burden when a defendant has demonstrated the protection first applies. See *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). With no specific evidentiary proof that demonstrates their resolve to litigate, Depositors has failed to show work product protection exists. Therefore, the documents withheld pursuant to work product are not protected and the Court orders Depositors to produce them.

Conclusion

Plaintiff's motion is GRANTED. Depositors has failed to provide sufficient evidence supporting

its claims of either attorney-client privilege or work product for the withheld documents. Depositors will produce the requested materials within seven days of this order.

The Clerk is directed to send a copy of this order to all counsel of record.

W.D.Wash.,2010.
Bronsink v. Allied Property and Cas. Ins.
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END OF DOCUMENT

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▷

United States District Court,
 S.D. Indiana,
 Indianapolis Division.
 Jill COMPTON, Plaintiff,
 v.

ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant.

No. 1:10-cv-01448-LJM-DML.
 Dec. 13, 2011.

Order Granting Reconsideration in Part Jan. 25, 2012.

Background: Insured filed suit against insurer to recover for losses to home destroyed by fire. Insurer objected to producing portions of computerized claims record, and contended that redactions were justified to protect privileged information.

Holdings: The District Court, Debra McVicker Lynch, United States Magistrate Judge, held that:

- (1) none of claim notes entered on computerized system before insured filed suit were protected work product;
- (2) specified communications between claims examiner and outside lawyer were privileged;
- (3) insurer's loss reserves information was not privileged;
- (4) information about another insured's claim was not protected by insured-insurer privilege;
- (5) subrogation information was not privileged; and
- (6) information labeled irrelevant was not privileged.

Ordered accordingly.

West Headnotes

[1] Federal Courts 170B ↪416

170B Federal Courts

170BVI State Laws as Rules of Decision
 170BVI(C) Application to Particular Matters
 170Bk416 k. Evidence law. Most Cited Cases

A party's ability to withhold documents based on the work product doctrine is governed by federal law.

Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ↪1604(1)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In general. Most Cited

Cases

An insurance company in a first-party insurance coverage dispute may not withhold on work product grounds material that it or its representatives prepared as part of the normal course of the insurance business, as contrasted to documents prepared for purposes of litigation with its insured. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ↪1604(1)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In general. Most Cited

Cases

In analyzing applicability of the work product doctrine in the insurance context, the same document or an entry in a document can serve both litigation and ordinary business purposes. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[4] Federal Civil Procedure 170A ↪1604(1)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

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170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In general. Most Cited Cases

A document that serves both litigation and ordinary business purposes may be protected work product, where the primary motivating purpose behind the creation of a document or investigative report is to aid in possible litigation. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In general. Most Cited Cases

Insurer's redacted claim notes entered on computerized claims recordkeeping system by insurer's employees, as reference source of all activities undertaken in investigating and processing insured's allegedly out-of-the-ordinary suspicious claim for losses incurred from fire that destroyed her home, were not protected from discovery, under work product doctrine, since none of notes entered before insured's suit was filed were made with primary motivating purpose of aiding in possible litigation, but rather were part of insurer's normal course of business that included adjustment of both suspicious and ordinary claims. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege; Trial Preparation Materials

170Ak1604(1) k. In general. Most Cited

Cases

The existence of an out-of-the-ordinary insurance claim does not transform work regarding the claim into litigation work product.

[7] Privileged Communications and Confidentiality 311H 152

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk144 Subject Matter; Particular Cases

311Hk152 k. Insurance. Most Cited Cases

Insurer's redacted entries on computerized claims recordkeeping system, consisting of claims examiner's communications with outside lawyer hired to conduct oral examinations of insured and her daughter regarding claim for losses to insured's home destroyed by fire, were protected by attorney-client privilege under Indiana law, but only communications concerning legal advice regarding claim or involving exchange of information to obtain legal advice, not discussing meeting arrangements or transferring information consistent with claims adjustment function. West's A.I.C. 34-46-3-1.

[8] Privileged Communications and Confidentiality 311H 423

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk423 k. Miscellaneous privileges; particular cases. Most Cited Cases

Insurer's redacted entries on computerized claims recordkeeping system, consisting of insurance reserve information, were not protected from discovery by any privilege, in insured's action seeking to recover for losses to her home destroyed by fire.

[9] Privileged Communications and Confidentiality 311H 409

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk409 k. Insurer and insured. Most Cited Cases

Insurer's redacted entries on computerized claims recordkeeping system, consisting of information about

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adjustment of another insured's claim, was not protected by insured-insurer privilege under Indiana law, in insured's lawsuit seeking to recover for losses to her home destroyed by fire, since information from another insured was not concerning underlying event or in nature of communication that insured would make for purpose of obtaining legal advice.

[10] Federal Civil Procedure 170A ↪1604(1)

170A Federal Civil Procedure
 170AX Depositions and Discovery
 170AX(E) Discovery and Production of Documents and Other Tangible Things
 170AX(E)3 Particular Subject Matters
 170Ak1604 Work Product Privilege; Trial Preparation Materials
 170Ak1604(1) k. In general. Most Cited Cases

Insurer's redacted entries on computerized claims recordkeeping system, consisting of subrogation information, was not protected from discovery, in insured's lawsuit seeking to recover for losses to her home destroyed by fire, since information was not made primarily because of prospect of subrogation litigation, but rather reflected typical and ordinary evaluation of whether insurer had any subrogation interest to pursue.

[11] Federal Civil Procedure 170A ↪1595

170A Federal Civil Procedure
 170AX Depositions and Discovery
 170AX(E) Discovery and Production of Documents and Other Tangible Things
 170AX(E)3 Particular Subject Matters
 170Ak1595 k. Insurance, matters relating to. Most Cited Cases

Insurer's redacted entries on computerized claims recordkeeping system, consisting of information labeled as irrelevant due to unlikelihood of resulting in discovery of admissible evidence, was not protected from discovery, in insured's lawsuit seeking to recover for losses to her home destroyed by fire, since presence of information on main claims record system itself was sufficient to make information at least marginally relevant.

*195 William E. Winingham, Wilson Kehoe & Winingham, Indianapolis, IN, for Plaintiff.

Jeffrey William Ferrand, Thomas R. Haley, III, Jennings Taylor Wheeler & Haley, Carmel, IN, for Defendant.

Order Following In Camera Review

DEBRA McVICKER LYNCH, United States Magistrate Judge.

On November 15, 2011, the court held a discovery hearing on defendant Allstate Property & Casualty Insurance Company's ("Allstate") objections to producing certain portions of a computerized claims record known as the NextGen record. The court heard argument from the parties and ordered Allstate to submit the record for *in camera* review. The parties also provided the court with the deposition transcript of an Allstate claims examiner, Bradley Schaefer, who testified regarding the claims record and his practices in keeping track of his activities by making entries in the NextGen record.

Allstate contends that its redactions are proper because they are protected from disclosure by the attorney-client privilege or the work product doctrine. Allstate made other redactions because entries were "privileged" insurance reserve information, "privileged" information regarding another insured, or "privileged" subrogation information. In addition, Allstate justifies some redactions on the ground that the information is not relevant. Allstate has coded the NextGen record to show its grounds for each redaction.

The court has carefully reviewed the NextGen record and the reasons for Allstate's redactions, examined applicable law, and makes the determinations explained below.

Factual Background

This case concerns insurance coverage to Ms. Compton for losses from a November 15, 2009 fire that destroyed a home she owned. Allstate, by Mr. Schaefer, advised Ms. Compton by letter dated July 8, 2010, of Allstate's denial of her claim. Mr. Schaefer was the primary claims examiner for Ms. Compton's claim. He

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works in one of Allstate's special claims investigation units, a unit to which "suspicious" claims are sent for handling. A claim may be labeled "suspicious" if, for example, the insured has a significant history of prior claims, a fire appears to have suspicious origins, the insured appears to have had a financial motive, or there is an indication that an insured may have made misrepresentations about the claim. For various reasons, Ms. Compton's claim was investigated primarily under Mr. Schaefer's direction, and the claim was ultimately denied based on alleged material misrepresentations that Ms. Compton made in connection with her claim. Further, although Allstate concluded that the fire was intentionally set, Mr. Schaefer had (and has) no basis to believe that Ms. Compton set the fire or caused it to be set.

Allstate uses a computerized claims recordkeeping system called NextGen. The NextGen system is used by Allstate representatives to record their activities in connection with the claim process. The NextGen claims notes entered by Allstate personnel are used by Allstate as a reference source of all activities undertaken in investigating and processing a claim. Mr. Schaefer testified that his activities for Ms. Compton's claim included having discussions with field adjusters and personal property adjusters, hiring an investigator to perform a "cause and origin" analysis and report, obtaining information from the local fire department, hiring an investigator to interview persons in Ms. Compton's neighborhood to find witnesses regarding the fire or other activities at the home, conducting background checks regarding Ms. Compton including with respect to her finances and bankruptcy filings, reviewing claims files for other claims Ms. Compton *196 has made, hiring outside counsel to take Ms. Compton's and her daughter's examination, and participating in those examinations. Mr. Schaefer also testified that, at least up to the time that he sent the July 8, 2010 letter to Ms. Compton denying her claim, he had no reason to believe that Ms. Compton intended to hire counsel or that this matter would lead to litigation.

Mr. Schaefer agreed that his documentation of activities as part of evaluating Ms. Compton's claim in

the NextGen computerized notes was done as part of the ordinary course of his claim evaluation.

Analysis

Work Product Doctrine

The court first addresses the work product doctrine and its application in the first-party insurance context.

[1][2][3][4] Allstate's ability to withhold documents based on the work product doctrine is governed by federal law. *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 658 (S.D.Ind.1991). The work product doctrine protects from disclosure (1) documents and tangible things (2) prepared in anticipation of litigation or for trial (3) by or for a party or its representatives. Fed.R.Civ.P. 26(b)(3). An insurance company in a first-party insurance coverage dispute may not withhold on work product grounds material that it or its representatives prepared as part of the normal course of the insurance business, as contrasted to documents prepared for purposes of litigation with its insured. *See Harper*, 138 F.R.D. 655 (S.D.Ind.1991) (containing detailed discussion for applying the anticipation of litigation factor in insurance coverage litigation). In the insurance context, the same document (or an entry in a document) can serve both litigation and ordinary business purposes. *Harper*, 138 F.R.D. at 661 n. 2. A document that serves dual purposes *may* be protected work product for purposes of Rule 26(b)(3) where the " 'primary motivating purpose behind the creation of a document or investigative report [is] to aid in possible litigation.' " *Binks Mfg. Co. v. National Presto Industries, Inc.*, 709 F.2d 1109, 1118 (7th Cir.1983) (quoting *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C.1982)). *See also Stout v. Illinois Farmers Ins. Co.*, 852 F.Supp. 704, 706 (S.D.Ind.1994) (for document to fall within work product doctrine, "it must pass the 'primary motivating purpose' test" discussed in *Binks*).

[5][6] Allstate has redacted entries from the NextGen record as work product on the ground that the investigation of Ms. Compton's claim was "outside the scope of ordinary claims adjustment with the prospect of litigation." It points to the numerous grounds it had for suspecting foul play (by someone) or an otherwise improper claim by Ms. Compton as justification for la-

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being the entries work product. But the existence of an out-of-the-ordinary claim does not transform work regarding the claim into litigation work product. Allstate's normal course of business includes the adjustment of both "suspicious" claims and "ordinary" claims. Although Allstate may assign specialists to adjust "suspicious" claims and those specialists may undertake a more rigorous and detailed investigation of a claim than Allstate finds necessary for "ordinary" claims, the investigation and adjustment of a "suspicious" claim still falls within Allstate's ordinary business duty to its insured to examine, adjust, and investigate the claim, and to determine whether and the extent to which the claim must be covered.

Based on the court's review of the NextGen record and Mr. Schaefer's testimony regarding his activities, the court finds that none of the entries *before suit was filed by Ms. Compton* were made with the "primary motivating purpose" to aid in possible litigation. The seven entries dated 11/19/2010, after Ms. Compton filed her lawsuit, and redacted on work product grounds, need not be produced.

Attorney-Client Privilege

Allstate made redactions to some entries because they reflect communications between Allstate and an outside lawyer it hired to conduct the oral examinations, under oath, of Ms. Compton and her daughter.

In a diversity case where state law provides the substantive rule of decision, privileges are determined in accordance with the *197 applicable state law. Fed.R.Evid. 501. In the absence of argument that another state's laws apply, and because the home destroyed in the fire was located in Indiana, the court will apply Indiana attorney-client privilege law to the issues presented. *National Union Fire Ins. Co. v. Standard Fusee Corp.*, 940 N.E.2d 810, 814 (Ind.2010) (quoting *Dunn v. Meridian Mutual Ins. Co.*, 836 N.E.2d 249, 251 (Ind.2005)) (general rule is that an insurance policy "is governed by the law of the principal location of the insured risk during the term of the policy").

Indiana's attorney-client privilege is an evidentiary privilege codified at Ind.Code § 34-46-3-1:

Except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases.

It assures a client that it can provide complete and candid information in confidence to its counsel and counsel in turn can provide complete and candid legal advice about the client's rights and liabilities without fear that the confidences will be revealed. *Lahr v. State*, 731 N.E.2d 479, 482 (Ind.Ct.App.2000); *Hartford Financial Services Group, Inc. v. Lake Cnty. Park and Recreation Bd.*, 717 N.E.2d 1232, 1235 (Ind.Ct.App.1999)

Indiana courts have applied the attorney-client privilege to protect from disclosure communications between a lawyer and an insurance company regarding the company's coverage rights and obligations to its insured. See *Hartford Financial*, 717 N.E.2d at 1236 ("Simply put, Hartford retained counsel to investigate [its insured's] claim, render legal advice and make a coverage determination under the policy"); *Howard v. Dravet*, 813 N.E.2d 1217, 1222 (Ind.Ct.App.2004) (evaluation letter written by outside counsel to the insurer contained legal advice and "is protected by the attorney-client privilege because it involved confidential communications"). See also *Irving Materials, Inc. v. Zurich American Ins. Co.*, 2007 WL 4616917 at *4 (S.D.Ind. Dec. 28, 2007) ("The attorney-client privilege can, however, be invoked for information pertaining to general coverage issues (in contrast with the specific handling of the underlying claims) and other legal advice.")

[7] The court's review of the NextGen report shows that Mr. Schaefer had various communications with attorney Scott Tyler, a lawyer in private practice who acted as outside counsel to Allstate, and with whom Mr. Schaefer communicated about the oral examinations of Ms. Compton and her daughter, and about coverage of the claim. Some of those communications concern legal advice regarding the claim or involve the exchange of information for the purpose of obtaining legal advice.

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But other entries reflecting communications between Mr. Schaefer and Mr. Tyler do not relate to the provision of legal advice but rather discuss meeting arrangements or transfer information consistent with the claims adjustment function. Legal advice does not appear to have been the aim of these communications. *See Lahr*, 731 N.E.2d at 482 (“not every communication between an attorney and client is deemed a ‘confidential communication’ entitled to a reasonable expectation of confid-

entiality”).

Allstate may maintain its redactions made on attorney-client privilege grounds for the following entries only:

<i>Date/Time of Entry</i>	<i>Page of NextGen Report</i>
1/13/2010; 8:52 AM	88–89
1/21/2010; 8:08 AM	84
1/21/2010; 8:00 AM	84
1/25/2010; 10:19 AM	82 (attachment only)
2/10/2010; 3:31 PM	75
2/17/2010; 11:57 AM	72–73
2/24/2010; 9:45 am	71 (last 3 lines only)
2/24/2010; 10:59 AM	69–70
3/11/2010; 2:10 PM	65–66
3/16/2010; 9:25 AM	62
3/25/2010; 9:27 AM	57–58
4/19/2010; 10:14 AM	51
4/19/2010; 1:35 PM	50
4/27/2010; 1:41 PM	46–47
4/27/2010; 3:42 PM	45
4/27/2010; 3:50 PM	44–45
5/6/2010; 1:51 PM	41–42
5/7/2010; 8:30 AM	41
5/7/2010; 9:08 AM	40–41
5/13/2010; 1:39 PM	38
5/27/2010; 2:04 PM	34
5/27/2010; 2:22 PM	33
6/10/2010; 11:12 AM	30
6/10/2010; 4:41 PM	30
6/10/2010; 4:43 PM	30
6/14/2010; 3:24 PM	28
6/22/2010; 3:45 PM	25–26
6/22/2010; 3:52 PM	25

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6/23/2010; 2:58 PM	25
6/23/2010; 3:20 PM	24–25
7/8/2010; 9:03 AM	22
7/14/2010; 2:48 PM	19
7/15/2010; 2:25 PM	19
7/29/2010; 9:58 AM	17
8/3/2010; 7:16 AM	16

***198 Loss Reserves Information**

[8] Allstate has made redactions to entries on the ground that the information is “privileged insurance reserve information,” but it has not provided the court with any authority or factual analysis that would permit the court to conclude that the information fits any privilege. The court understands that insurers are reluctant to share reserve information because reserves generally reflect only precautionary estimates used for business-risk purposes and not an insurer’s opinion about the merits of a claim. But the court has no basis for finding the information wholly irrelevant or for finding that the burden of revealing the information in the NextGen report outweighs any potential relevance. *See, e.g., Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1190–1192 (Colo.2002) (discussion of cases from other jurisdictions on discoverability of loss reserve information in both the first-party and third-party insurance context). This is not to say that the reserve information is admissible.

On the record before it, the court finds no legal basis for permitting Allstate to redact the loss reserve information for discovery purposes.

Other Information Allstate Asserts Is Privileged or Irrelevant

[9] Allstate redacted a few other entries—those relating to potential subrogation claims and those regarding the adjustment of a claim by the mortgagee on the home—on the ground that the information is irrelevant or otherwise “privileged.” Allstate maintains that information about adjustment of the mortgagee’s claim is privileged. The court assumes Allstate is invoking the insured-insurer privilege recognized in *Richey v. Chappell*, 594 N.E.2d 443 (Ind.1992). *Richey* held that an in-

sured’s statement about the underlying event given to the insurer (which has a duty to defend its insured) and that is in the nature of a communication the insured would make for the purpose of obtaining legal advice, can be protected from discovery by the person suing the insured. The entries regarding the mortgagee in the NextGen report do not remotely fit these circumstances.

[10] The entries in the NextGen report regarding subrogation do not appear to have been made primarily because of the prospect of subrogation litigation, but appear to reflect a typical and ordinary evaluation of whether the insurer has any subrogation interest to pursue.

[11] With respect to the few entries that Allstate additionally asserts relate to matters “unlikely to result in the discovery of admissible evidence,” the court finds that the presence*199 of the information within the main claims record itself is sufficient to make the information at least marginally relevant. The court can find no countervailing burden to their production that justifies their redaction.

Thus, with respect to entries Allstate labeled as “irrelevant,” or privileged because they concern subrogation interests, or privileged because they involve the mortgagee, the court finds that the redactions are not appropriate.

Conclusion

Based on the above analysis and the court’s *in camera* review of the redactions to the NextGen computer claims report, the only redactions that Allstate may maintain are those identified in this order on pages five (seven entries redacted on work product grounds) and seven and eight (list of entries redacted on attorney-clie-

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ent privilege grounds). All other portions of the NextGen report must be produced. Allstate must produce the NextGen report, with the revised redactions as provided in this order, by December 28, 2011.

Further, because the new version of the NextGen report reveals significantly more information than Ms. Compton had available to her when Mr. Schaefer was first deposed and because Mr. Schaefer's testimony established that his recollection about various matters may be refreshed by entries in the NextGen report that had been redacted, Ms. Compton may resume the deposition of Mr. Schaefer.

So ORDERED.

Order On Defendant's Motion to Reconsider

Defendant Allstate Property & Casualty Insurance Company ("Allstate") asks the court to reconsider its Order Following *In Camera* Review, entered December 13, 2011 (Dkt. 41), with respect to one matter: whether Allstate should be permitted to redact from the NextGen record reserve information that Allstate contends on reconsideration is not relevant. (Dkt. 47). Plaintiff Jill Compton opposes Allstate's motion and asserts that the reserve information is relevant to her allegation that Allstate acted in bad faith in denying her claim. (See Dkt. 49 at pp. 2 and 3).

Ms. Compton states: "Whether Allstate put aside a reserve in a case, and when, could evidence bad faith on the part of the insurance company." (Dkt. 49 at p. 4). She explains her relevance theory by contrasting it with an argument addressed by the Supreme Court of Colorado in *Silva v. Basin Western, Inc.*, 47 P.3d 1184 (Colo.2002), in which the plaintiff suing an insured sought disclosure of the amount of reserves the defendant's insurer had set aside for the claim. Ms. Compton states that the issue in *Silva* was disclosure of the *amount* of reserves, not whether money was "even set aside" by the insurer, and she seeks "to know if reserves were initially set aside to go towards [her] complaint that the Defendant acted in bad faith and breached the contract." (Dkt. 49 at p. 4).

Allstate's reply brief states that the precise informa-

tion that Ms. Compton contends is relevant—whether reserves were set at all—can be provided while still protecting the information that Allstate contends is not relevant to any issue—information relating to actual reserve amounts or values. Allstate suggests that the court, based on its *in camera* review, should simply provide Ms. Compton with the assurance that reserves were set. (Dkt. 50 at 1–2). The court declines to perform that role in the discovery process, but agrees with Allstate that Ms. Compton has argued only that information about when and whether "reserves were initially set aside" is relevant and has not suggested that reserve amounts are relevant to her claims.^{FN1}

FN1. Relevance is a case-specific inquiry. See Fed.R.Evid. 401. Thus, the court can agree with Ms. Compton that reserves information *can* be relevant to a bad faith claim and with Allstate that reserves information can be irrelevant to insurance coverage and bad faith disputes (and that the information is likely always irrelevant in the third-party context such as that addressed in *Schierenberg v. Howell-Baldwin*, 571 N.E.2d 335 (Ind.Ct.App.1991)). But the issue for this court is whether and how the information may illuminate—or lead to evidence that may illuminate—whether Allstate breached any duty to Ms. Compton in its handling and ultimate denial of the claim. As noted above, Ms. Compton has not argued that the actual reserve amounts are relevant to any of her claims and contends only that whether reserves were initially set aside is relevant.

The court therefore upholds Allstate's objection to revealing within the NextGen record information related to the actual reserve *200 amounts or values. Allstate may redact from the NextGen record all references to actual reserve amounts or values, although Allstate must reveal wording within the NextGen record denoting the fact of setting a reserve. For example, for the entry dated November 17, 2009 at 8:33 AM, Allstate may redact the dollar figure but not the words "Set reserve at."

Conclusion

Allstate's motion to reconsider (Dkt. 47) is GRAN-

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TED in PART. Allstate may redact from the NextGen record all information related to the actual reserve amounts or values.

So ORDERED.

S.D.Ind.,2011.
Compton v. Allstate Property & Cas. Ins. Co.
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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.

HSS ENTERPRISES, LLC, Plaintiff,

v.

AMCO INSURANCE COMPANY, Defendant.

No. C06-1485-JPD.

Jan. 14, 2008.

Bruce A. Winchell, Geoffrey M. Grindland,
Stephania Camp Denton, Mills Meyers Swartling,
Seattle, WA, for Plaintiff.

Sylvia Karen Bamberger, Lawrence Gottlieb, Betts
Patterson & Mines, Seattle, WA, for Defendant.

ORDER PARTIALLY GRANTING PLAINTIFF'S
MOTION TO COMPEL, AND DIRECTING FUR-
THER ACTION BY THE PARTIES
IVIES P. DONOHUE, United States Magistrate
Judge.

I. INTRODUCTION AND SUMMARY CONCLU- SION

*1 The present matter comes before the Court on the plaintiff's motion to compel production of documents withheld by the defendant on the basis of attorney-client privilege or the work product doctrine. Dkt. No. 25. The defendant has filed a response opposing this motion, see Dkt. No. 30, to which plaintiff has replied. Dkt. No. 32. After careful consideration of the motions, briefs, governing law, and the balance of the record, the Court ORDERS that plaintiff's Motion to Compel (Dkt. No. 25) be GRANTED IN PART.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff HSS Enterprises is an auto repair business located in Kennewick, Washington. Its primary business involves the sale and installation of new and used tires and related parts. On September 15, 2005, plaintiff's leased building in Ken-

newick caught fire. Because the building had no sprinkler system, much of its interior sustained fire, soot, smoke, and water damage.

At the time of the fire, plaintiff was insured through defendant AMCO Insurance Company under a "Premier Businessowners Policy." Plaintiff immediately reported the loss to defendant, and defendant assigned a "large loss" adjuster to determine the extent of the loss and otherwise investigate the claim. Two adjusters, three law firms, and two years later, that process continues, and gives rise to the present discovery dispute.

Defendant takes the position that its claim investigation is still ongoing. Instead of issuing or denying claim payments, defendant has paid to plaintiff over \$200,000 in "advances" on business personal property and income loss or extra expense coverage in lieu of a final adjustment. The record reflects that defendant provided \$108,498.25 for "advance of [business personal property,]" \$33,916.69 for a "Northwest Restoration invoice," and \$68,679.66 for income lost/extra expense presented to RGL Accounting. Dkt. No. 28, Ex. 3 at 93-96. On numerous occasions throughout 2006 and 2007, plaintiff sought information regarding how defendant's sporadic payments had been calculated or allocated under the various coverages under the policy. See, e.g., Dkt. No. 28, Ex. 3 at 104-05, 112-16. Defendant provided no such information until September 20, 2007, when it produced a chart representing its assessment of the plaintiff's tire loss, but without information regarding the chart's author, its source of information, or date of creation. Dkt. No. 28, Ex. 4 at 138-40.

The parties dispute almost every factual aspect of this case. They dispute the policy terms, the inventories of the damaged property, the value of the tire loss, the work of public and private adjusters, the format of defendant's advances, the current status defendant's claim investigation and, of primary importance to the instant motion, the role

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of the law firms hired by the defendant—the Brady Law Chartered, and the firm of Betts, Patterson & Mines.

The Idaho firm of Brady Law Chartered was hired in June 2006 to monitor progress of the claim, conduct Examinations Under Oath (“EUO”), and assist defendant with its factual investigation and adjustment of the loss. Its hiring came shortly after a May 2006 incident where plaintiff’s and defendant’s adjusters engaged in a heated argument regarding plaintiff’s proof of loss request. The fact that litigation commenced shortly thereafter was likely coincidental. Due to a one-year suit limitation provision in the insurance policy, plaintiff had little choice but to exercise that right, and filed suit in King County Superior Court on September 15, 2006, asserting claims for breach of contract, bad faith, and violation of the Washington Consumer Protection Act. *See* Dkt. No. 1, Ex. 1. One month later, defendant removed the case to this district pursuant to 28 U.S.C. §§ 1331 and 1441. At or near this time, defendant hired the Betts Patterson law firm to defend the coverage litigation and assigned a separate internal adjuster, Brian Ramage, to whom the Betts Patterson lawyers reported. Dkt. No. 28, Ex. 1 at 25-27.

*2 Shortly thereafter, the parties agreed to a five-month stay of the litigation, *see* Dkt. No. 13, but during this time, the Brady attorneys (Mike Bray and Glenda Talbutt) and defendant’s adjuster (Dale Walls) continued to assist defendant in investigating and adjusting plaintiff’s claim. *See, e.g.*, Dkt. No. 28, Ex. 1 at 4. The record also reflects that as of late September 2007, the coverage work of these attorneys continued. *See* Dkt. No. 28, Ex. 4 at 124-36 (Glenda Talbutt letters to tire vendors); Dkt. No. 33 at 7-8 (Michael Brady letter); Dkt. No. 33 at 17-18 (Michael Brady letter); Dkt. No. 33 at 19 (Glenda Talbutt email). It is undisputed that, both before and after the suit was commenced, Brady Law attorneys handled the EUOs of plaintiff’s management. The record also reflects the defendant’s general view that EUOs are non-adversarial pro-

ceedings, despite the fact that they always hire attorneys to conduct EUOs. Dkt. No. 28, Ex. 1 at 26. Furthermore, discussions between the parties make clear that EUOs would be conducted by Brady lawyers, and depositions by Betts Patterson lawyers. *See* Dkt. No. 33 at 5-16. In sum, while some of the work performed by the Brady law firm may have been related to the underlying litigation in this case, it appears that the Brady law firm has acted primarily for investigation and coverage purposes, and the Betts Patterson law firm has served as litigation counsel.

In late October 2007, defendant produced three separate privilege logs: one relating to the claim file, one relating to defendant’s withheld “e-file,” and one relating to Brady law firm documents and correspondence. *See* Dkt. No. 28, Ex. 1 at 4-24. Defendant did not produce, and its privilege logs do not include, documents from the files of the Betts Patterson law firm or from the internal adjuster to whom the Betts Patterson attorneys report. The plaintiff seeks all documents withheld by defendant on the basis of the work product protection or attorney-client privilege between the insurer and Brady law attorneys.

III. DISCUSSION

The core of plaintiff’s motion involves the attorney-client privilege and work product doctrine—the two grounds for nondisclosure asserted by the defendant in this discovery dispute. The plaintiff primarily argues that the documents it seeks are not privileged because the Brady lawyers involved were hired by defendant to investigate and adjust its insurance claim, not to defend the coverage litigation. Dkt. No. 25 at 11-13. In addition, the plaintiff contends that those documents are not work product because they were prepared during the ordinary investigation and adjustment of its insurance claim and before defendant communication any coverage position; further, even assuming the doctrine applies, the plaintiff argues that it has shown substantial need for the withheld documents. Dkt. No. 25 at 17-22. In the alternative, the plaintiff argues that,

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should the Court not compel production of the documents in question, the defendant must be precluded from offering evidence at trial based on communications with or investigatory work performed by the Brady lawyers. Dkt. No. 25 at 24. FN1

FN1. The Court's partial resolution of this motion does not require it to address several of plaintiff's sub-arguments, either because the material at issue is not privileged, or because a specific argument is premature at this time. Based on the current state of the record, however, it is clear that plaintiff has not met the civil fraud exception to any communications potentially protected by the attorney-client privilege. See *Barry v. USAA*, 98 Wn.App. 199, 205, 989 P.2d 1172, 1176 (Wash.Ct.App.1999) (requiring a showing that "(1) [defendant] was engaged in or planning a fraud at the time the privileged communication was made, and (2) the communication was made in furtherance of that activity").

A. Washington Substantive Law and Federal Procedural Law Govern this Dispute

*3 Under the *Erie* Doctrine, a federal court sitting in diversity applies federal procedural law and the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir.2003). The attorney-client privilege, as a substantive evidentiary privilege, is governed by state law. See Fed.R.Evid. 501; *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 666 (W.D.Wash.2007). The work product doctrine, on the other hand, is deemed a procedural immunity. See *Union Pacific R. Co. v. Mower*, 219 F.3d 1069, 1077 n. 8 (9th Cir.2000). Its application is therefore governed by the Federal Rules of Civil Procedure. See, e.g., *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir.1988).

B. Attorney-Client Privilege

The attorney-client privilege protects confiden-

tial communications between attorneys and clients from discovery or public disclosure. R.C.W. § 5.60.060(2)(a); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26, 32 (2004). Because the privilege "impedes full and free discovery of the truth," it must be strictly construed. *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir.1989). The attorney-client privilege "[i]s not dependent whatsoever upon the anticipation of litigation, but instead depends upon the nature of the relationship involved." *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D.Minn.1986). It protects only communications and advice between attorney and client in the context of a professional relationship involving the attorney as an attorney, not documents that are prepared for some other purpose. *Schmidt v. California State Auto. Ass'n*, 127 F.R.D. 182, 183 (D.Nev.1989); *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981). The burden of establishing privilege rests on the party asserting it. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 332, 11 P.3d 866, 878 (2005).

In the insurance context, the question of whether a communication falls within the attorney-client privilege can often be a difficult one because of the investigatory nature of the insurance business. The line between what constitutes claim handling and the rendition of legal advice is often more cloudy than crystalline. However, it is obvious that the claim file and related material in an insurance bad faith action contains critical evidence regarding the investigation, analysis, and ultimate decision regarding an insured's claim. See *Brown v. Superior Court*, 670 P.2d 725, 734 (Ariz.1983); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 293 (D.Mont.1998). Accordingly, to the extent that an attorney acts as a claims adjuster, claims process supervisor, or claims investigation monitor, and not as a legal advisor, the attorney-client privilege does not apply. *Mission Nat'l*, 112 F.R.D. at 163; see also *Dawson v. New York Life Ins. Co.*, 901 F.Supp. 1362, 1367 (N.D.Ill.1995) (attorney-client privilege did not attach where attorneys were acting more as

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“couriers of factual information” rather than “legal advisors”); *Schmidt v. California State Auto. Ass’n*, 127 F.R.D. 182, 183 (D.Nev.1989) (“The entire claims file is not shielded by the attorney-client privilege because not all of the material within the claims file embodies confidential communications between the defendant and an attorney *acting in the role of attorney.*”) (emphasis added). The public policy reason behind this conclusion is that insurance companies should not be permitted to insulate the factual findings of a claims investigation by the involvement of an attorney to perform, or help perform, such work.

*4 Here, defendant insists that the attorney-client privilege applies to the communications between it and the Brady law firm because the firm's claims investigation work was not “routine,” but it cites no authority supporting this proposition. It also points out that the firm was retained nine months *after* the fire, albeit before litigation commenced. As outlined above, in order to be subject to the attorney-client privilege, the communication must have been made for the purpose of rendering legal advice, not for documents prepared for some other purpose. *Admiral Ins. Co. v. U.S. District Court*, 881 F.2d 1486, 1492 (9th Cir.1989); *Kammerer*, 96 Wn.2d at 421, 635 P.2d at 710; *see also In re Grand Jury Investigation*, 974 F.2d 1968, 1070 (9th Cir.1992) (“[T]he privilege is limited to only those disclosures-*u*ecessary to obtain informed legal advice-which might not have been made absent the privilege.”) (internal quotation omitted). Here, the defendant does not deny that the Brady law firm was retained by the defendant to assist in investigating and adjusting plaintiff's fire loss claim, and the record reflects that this is precisely what those lawyers did. *See, e.g.*, Dkt. No. 28, Ex. 1 at 4, Ex. 4 at 124-36; Dkt. No. 33 at 7-8, 7-19. The efforts of and documents generated by the Brady lawyers were made for the purpose of claims investigation and adjustment, not for the purpose of rendering legal services in this litigation. Accordingly, such materials are not protected by the attorney-client privilege.

C. Work Product Doctrine

The work product doctrine provides a qualified immunity for material prepared “in anticipation of litigation” by a party or its representative. Fed.R.Civ.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine protects “trial preparation materials that reveal an attorney's strategy, intended lines of proof, evaluation of strengths and weaknesses, and inferences drawn from interviews.” *Heath v. F/V ZOLOTUI*, 221 F.R.D. 545, 549 (W.D.Wash.2004). The party asserting the work product doctrine has the burden of establishing, for each document, the rule's application. *Id.*; *Yurick v. Liberty Mut. Ins. Co.*, 201 F.R.D. 465, 472 (D.Ariz.2001).

“It is well established that documents prepared in the ordinary course of business are not protected by the work-product doctrine because they would have been created regardless of the litigation.” *Id.* at 549-50. Even if such documents might help in *preparation* for litigation, they do not qualify for work-product protection. *United States v. Adiman*, 134 F.3d 1194, 1202 (2d Cir.1998). Rather, “the material must have been produced because of that prospect of litigation and for no other purpose.” *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 660 (S.D.Ind.1991). In the present context, insurance companies have a duty to investigate, evaluate, and adjust claims made by their insureds. *Heath*, 221 F.R.D. at 550. The creation of documents during this process is part of the ordinary course of business of insurance companies, and the fact that litigation is pending or may eventually ensue does not cloak such documents with work-product protection. *Id.*; *see also Goodyear Tire & Rubber Co. v. Cbiles Power Supply, Inc.*, 190 F.R.D. 532, 535 (S.D.Ind.1999).

*5 As explained above, the proponent of work product protection bears the burden of establishing, for each document, the doctrine's application. *Heath*, 221 F.R.D. at 549. Here, it is apparent that the defendant has chosen not to do so. Neither its privilege log nor its brief show how the documents

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in question were generated solely for purposes of preparing the insurer's defense, rather than in the ordinary course of business. Accordingly, any ruling by this Court can only be non-specific and only protect documents generated by defendant and its coverage counsel solely for the purpose of preparing a defense.

The line between materials prepared in the ordinary course of business and work product prepared in anticipation of litigation evades precise demarcation. Courts look to a variety of formulas for the necessary nexus between the creation of the material and the prospect of litigation. Some courts focus on the date a formal coverage position is taken. See, e.g., *Pete Rinaldi's Fast Foods, Inc. v. Great American Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C.1988) ("Normally, only after the insurance company makes a decision with respect to the claim, will it be possible for there to arise a reasonable threat of litigation so that information gathered thereafter might be said to be acquired in anticipation of litigation."). Some look to the date a lawsuit is threatened or filed. See, e.g., *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 93 (D.C.Mo.1980). Other courts do not view these dates as necessarily critical, and instead adopt a case-by-case analysis. See, e.g., *Schmidt*, 127 F.R.D. at 184 ("[M]aterial generated by the defendant after the complaint was filed might still not have been prepared in anticipation of litigation if the material only concerned facts and did not involve legal opinions or thoughts about the defendant's trial strategy and posture.").

The Court finds that a case-by-case analysis is more appropriate, see *Schmidt*, 127 F.R.D. at 184 n. 2, and therefore rejects defendant's argument that litigation is automatically anticipated for work-product purposes when a suit is "commenced." See Dkt. No. 30 at 14-15. An insurer's ordinary duty to investigate does not end when suit is filed, especially here, where filing was precipitated more by a limitation clause than a threat to litigate, separate litigation counsel was selected, and the parties im-

mediately agreed to a lengthy stay. See *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 637 (N.D.Iowa 2000); *Harper*, 138 F.R.D. at 660. If the Court were to sustain the defendant's position emphasizing the filing date of the lawsuit, the work product protection would be automatically available at the whim of the insurer, regardless of whether the materials were prepared in the ordinary course of business. Insurers could insulate all claims investigation materials produced after the filing date by merely inserting an arbitrary suit limitation clause into its policy, and forcing its insured to sue for coverage before the claim is fully adjusted. The Court cannot accept this approach.

1. Documents Not Protected by the Work Product Doctrine

*6 Beyond the policy's one-year limitation clause, which resulted in the filing of a September 15, 2006 complaint, defendant has done very little to present "specific evidentiary proof of objective facts demonstrating a resolve to litigate." *Pete Rinaldi's Fast Foods, Inc.*, 123 F.R.D. at 202. A heated argument between adjusters does not suffice.

The Court finds that the Brady attorneys were investigating whether (and what) factual bases existed for providing or rescinding coverage under the policy, and as a result, documents generated by that firm are not shielded by the work product doctrine. *St. Paul Reinsurance Company, Ltd.*, 197 F.R.D. at 637 ("[T]he coverage determination does not equate with a determination to litigate, but is instead part of the ordinary course of an insurer's business to determine coverage."). Documents at this stage of the investigation are not protected, "even if they include mental impressions, conclusions, and opinions of [Brady Lawyers] regarding the availability of coverage, because these impressions, conclusions, and opinions are part of the pure investigation and evaluation of coverage, not part of preparation for or anticipation of litigation." *Id.* Such material, even if "generated by the defendant after the complaint was filed[,] was not prepared in anticipation of litigation "if the material only concerned

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facts and did not involve legal opinions or thoughts about the defendant's trial strategy and posture." *Schmidt*, 127 F.R.D. at 184.

2. Documents Protected by the Work Product Doctrine

However, the Court finds that such material *is* protected work product, whether generated before or after the commencement of suit, if it concerned legal opinions, evaluations, or other thoughts about the trial strategy and posture of this coverage litigation. *Id.* While the Court does not have available the numerous documents withheld by the defendant, it is confident that the parties will be able to distinguish between, for example, reports generated after the September 2006 complaint which contain prior evaluations that are largely a continuation of the initial claims investigation, and reports that were generated solely for the purpose of preparing for the coverage litigation in this case. To the extent that a single document contains both coverage investigation information and counsel's mental processes bearing on trial strategy and posture, the defendant should be able to redact the latter such sections of the submitted documents.

IV. CONCLUSION

For the foregoing reasons, plaintiff's Motion to Compel (Dkt. No. 25) is GRANTED IN PART. The defendant is directed to submit new privilege logs to the plaintiff **no later than January 28, 2008**. The Court hereby compels production of all documents not protected by the attorney-client privilege and/or work product doctrine, and the same shall be produced to the plaintiff **no later than January 28, 2008**. The following guidelines shall apply to material included within defendants new privilege logs:

*7 (1) Communications between the defendant and the Brady law firm, and documents generated by the Brady lawyers for the defendant, are not protected by the attorney-client privilege.

(2) Communications between the Betts Patterson law firm and the defendant, however, are pro-

tected by the attorney-client privilege.

(3) Documents generated by the Brady lawyers which relate to their investigation and evaluation of plaintiff's insurance claim, as opposed to those lawyers' legal opinions or thoughts about the defendant's trial strategy, are not protected by the work product doctrine. This conclusion controls for documents produced before and after the date plaintiff's complaint was filed.

(4) To the extent a single document contains both coverage investigation information and counsel's mental processes bearing on trial strategy, the defendant will redact the latter such sections of the submitted documents.

(5) After production of documents so ordered, and after production of a more detailed privilege log identifying in greater detail the basis for any documents withheld, the parties will meet and confer to determine if there are any remaining disputes. If there are, the documents at issue will be identified and copies will be submitted for an *in camera* inspection. The Court will then review the documents and schedule a hearing on the same.

The Clerk of Court is directed to send a copy of this Order to the parties of record.

W.D. Wash., 2008.

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LIABILITY INSURANCE COVERAGE: THE FUNDAMENTALS AND HOT TOPICS

ADDITIONAL INSURED

The Fundamentals: Provision in construction agreement between general contractor and subcontractor, which required subcontractor to obtain additional liability insurance that named general contractor and its agents as additional insureds, was void under statute regarding indemnification provisions in construction contracts; statute not only prohibited direct indemnity arrangements between parties to a construction agreement, but also additional insurance arrangements by which one party was obligated to procure insurance for losses arising in whole or in part from the other's fault. *Walsh Const. Co. v. Mutual of Enumclaw*, 338 Or. 1, 104 P.3d 1146 (2005), *citing* ORS 30.140(1).

Hot Topics: “*Walsh* is no obstacle to finding that ORS 30.140(2) applies’ when fault by the subcontractor is alleged to have caused the injury, in whole or in part.” *Richardson v. Howard S. Wright Constr. Co.*, 2007 WL 1467411, 7–9 (D.Or. 2007) (unreported); *see also* ORS 30.140(2) (“This section does not affect any provision in a construction agreement that requires a person or that person’s surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor’s agents, representatives or subcontractors.”). However, where an employee files a complaint in which the contractor’s negligence is the sole basis for liability, the subcontractor’s insurer does not have a duty to defend. *See Clarendon Nat’l Ins. Co. v. American States Ins. Co.*, 688 F.Supp.2d 1186, 1192–3 (D.Or. 2010).

ASSIGNMENT

The Fundamentals: A policy provision that states that the “(a)ssignment of interest under this policy shall not bind the company until its consent is endorsed hereon,” does not preclude the assignment of a cause of action for damages for breach of a contract. *Groce v. Fidelity General Ins. Co.*, 252 Or. 296, 306, 448 P.2d 554, 559 (Or. 1968). However, an anti-assignment provision that states: “Your rights or duties under this policy may not be transferred without our written consent,” does. *Holloway v. Republic Indem. Co. of America*, 341 Or. 642, 652, 147 P.3d 329 (2006).

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Hot Topics: Does ORS 31.825 render anti-assignment provisions invalid? *Portland School Dist. No. 1J v. Great American Ins. Co.*, 241 Or. App. 161, 249 P.3d 148 (2011); see also ORS 31.825 (“A defendant in a tort action against whom a judgment has been rendered may assign any cause of action that defendant has against the defendant's insurer as a result of the judgment to the plaintiff in whose favor the judgment has been entered. That assignment and any release or covenant given for the assignment shall not extinguish the cause of action against the insurer unless the assignment specifically so provides.”)

BAD FAITH

The Fundamentals: When a liability insurer undertakes to “defend,” it agrees to provide legal representation and to stand in the shoes of the party that has been sued. The insured relinquishes control over the defense of the claim asserted. Its potential monetary liability is in the hands of the insurer. That kind of relationship carries with it a standard of care that exists independent of the contract and without reference to the specific terms of the contract. *Georgetown Realty, Inc. v. Home Ins. Co.*, 313 Or. 97, 110-111, 831 P.2d 7, 14 (1992). Damages in tort are not recoverable, however, where the insurer fails to undertake representation of insured at all. *Farris v. U.S. Fid. and Guar. Co.*, 284 Or. 453, 587 P.2d 1015 (1978)

Hot Topics: Court’s analysis of the type of special relationship that can give rise to a bad faith claim (not garden variety defense of insured). *Regence Group v. TIG Specialty Ins. Co.*, 2012 WL 4897370 (D.Or. 2012). Insured was not precluded from recovering on his fraud claim against homeowner's insurer on the basis he failed to plead and adduce evidence of a special relationship with insurer that gave rise to a standard of care independent of the one imposed by the homeowner's insurance policy. *Murphy v. Allstate Ins. Co.*, 251 Or.App. 316, 284 P.3d 524 (2012).

DUTY TO DEFEND

The Fundamentals: Under Oregon law, the insurance company's duty to defend is based solely on the allegations of the complaint. *Ledford v. Gutoski*, 319 Or. 397, 399, 877 P.2d 80 (1994). As the Oregon Supreme Court has explained, an insurance company should be able to determine from the face of the complaint whether to accept or reject the tender of the defense of the action. *Id.*, 319 Or. at 400. If any of the alleged conduct is covered by the policy, the insurance company must provide a defense to the entire complaint. *Id.* at 400. Even if the complaint at issue does allege intentional injury or other conduct not covered under the policy, there still may be a duty to defend. *Abrams v. General Star Indem. Co.*, 335 Or. 392, 394, 67 P.3d 931 (2003). However, the Oregon Supreme court has held a

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conviction of assault with a dangerous weapon upon victim, who subsequently sued insured for injuries inflicted by assault and battery, conclusively established that victim's injuries were intentionally inflicted; thus, insured's liability was not covered by liability policy which excluded coverage for intentionally inflicted injuries, and insurer had no duty to defend insured in victim's civil action. *Casey v. Northwestern Sec. Ins. Co.*, 260 Or. 485, 491 P.2d 208 (1971).

Hot Topics: *Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or. App. 468, 240 P.3d 67 (2010), articulates an exception to the “four-corners” test when you are determining a non-conduct issue such as who is an insured. *State Farm Fire and Cas. Co. v. American Family Mutual Ins. Co.*, 242 Or. App. 60, 253 P.3d 65 (2011), holds that a complaint that does not allege “property damage” does not trigger a duty to defend.

ENVIRONMENTAL COVERAGE

The Fundamentals: Oregon Environmental Cleanup Assistance Act, ORS 465.475 to 465.480, provides framework for handling environmental coverage claims and addressing lost policy issues. For example, ORS 465.480(6)(a) provides: “There is a rebuttable presumption that the costs of preliminary assessments, remedial investigations, risk assessments or other necessary investigation, as those terms are defined by rule by the Department of Environmental Quality, are defense costs payable by the insurer, subject to the provisions of the applicable general liability insurance policy or policies.”

Hot Topics: *Ash Grove Cement Co. v. Liberty Mut. Ins. Co.*, 2011 WL 2470109, (D. Or. June 20, 2011), the insured may attempt to establish whether “portions of the ADR process, or all of it, are reasonable and necessary defense costs.” The court will “need details on what categories of activities are occurring and what costs are incurred for each category.” *Certain Underwriters at Lloyd's London and Excess Ins. Co., Ltd. v. Massachusetts Bonding and Ins. Co.*, 235 Or.App. 99, 230 P.3d 103 (2010), settlement by some insurers, in insured's coverage action relating to underlying Department of Environmental Quality (DEQ) environmental cleanup action, did not operate to extinguish nonsettling insurers' alleged right to equitable contribution from settling insurers for defense costs paid prior to settlement

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KNOWN LOSS

The Fundamentals: *Malbco Holdings, LLC v. AMCO Ins. Co.*, 629 F.Supp.2d 1185 (D.Or. 2009): The “known loss” doctrine “disallows coverage where the loss to be insured is in progress or substantially likely to occur when the insurance contract is issued.” . . . [B]ased on *Commercial Bankers Life Ins. Co. v. Kirk*, 66 Or.App. 359, 364, 675 P.2d 1069, 1072 (1984), it is likely that Oregon courts would align themselves with those jurisdictions which only allow use of the “known loss” doctrine to invalidate coverage where the insurer shows that the insured fraudulently misrepresented or concealed a material fact. *But See City of Medford v. Argonaut Ins. Group*, 2011 WL 6019429, 1 (D.Or. 2011): The insured “concedes” that “no Oregon case has expressly adopted the ‘known loss’ or ‘loss in progress’ doctrine,” but argues that the doctrine is consistent with Oregon’s public policy against insuring intentionally harmful conduct. *See, e.g., Nielsen v. St. Paul Cos .*, 283 Or. 277, 280–81, 583 P.2d 545, 547 (1978) (“Insurance coverage for the protection of one who intentionally inflicts injury upon another is against public policy, and whether the insurer is relieved for this reason from the defense of an action against its insured depends upon the allegations of the complaint.”).

Hot Topics: *ZRZ Realty Co. v. Beneficial Fire and Cas. Ins. Co.*, 349 Or. 117, 124–125, 241 P.3d 710, 715 (2010): Insured has the burden of proof that damages were neither expected nor intended when policy covers “all sums which the Assured shall be obligated to pay by reason of the liability [i]mposed upon the Assured by law . . . for damages . . . on account of . . . [p]roperty damage . . . caused by or arising out of [an] occurrence” and defines “occurrence” as an “accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in * * * property damage * * * during the policy period.” In contrast, if policy does not expressly limit its coverage to damages not “expected or intended,” the court may read such a limitation into the policy, but the burden in on the insurer to show the insured expected or intended the damage.

“PROPERTY DAMAGE”

The Fundamentals: Use of word “physical” within comprehensive general liability policy, which defined “property damage” as “physical injury to or destruction of tangible property,” indicated that policy was not intended to afford coverage for consequential or intangible damage. Labor expense incurred by insured-lumber manufacturer, in taking 2 x 4 studs out of building after insured had sold such studs and it was subsequently determined that they were defective, was within coverage of comprehensive general liability policy, which provided that insurer was responsible for “ . . . all sums which the insured shall become legally obligated to

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pay as damages because of . . . property damage,” only to extent that any of such expense was attributable to tearing out and putting back parts of building other than studs. *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253 (1978). For a claim of faulty workmanship to give rise to “property damage,” a claimant must demonstrate that there is damage to property separate from the defective property itself. *MW Builders, Inc. v. Safeco Ins. Co. of America*, 267 Fed. Appx. 552 (9th Cir. 2008) (Oregon law).

Hot Topics: “The intentional assumption of a liability created through a contract does not result in physical injury or loss of use of property damage and is not tortious in nature.” *A & T Siding, Inc. v. Capitol Specialty Ins. Corp.*, 2011 WL 3651777, 9 (D.Or. 2011). *State Farm Fire and Cas. Co. v. American Family, supra.* (Complaint that alleged only damage to EIFS system installed by insured did not allege “injury to property covered by defendant’s policy.”)

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