IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC-01-0893
L.T. Case No.: 4D00-20047

ALLSTATE INDEMNITY COMPANY,
ALLSTATE INSURANCE COMPANY,
and PAUL COBB,

Petitioners,

vs.

JOAQUIN RUIZ and PAULINA RUIZ,

Respondents
_____/

_____

_____

RESPONDENTS' ANSWER BRIEF

_____

_____

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STATEMENT OF THE CASE AND FACTS

A. Underlying Facts

The underlying facts, as set forth in Plaintiff's Third Amended Complaint (R. Doc. #3), are as follows:

In March, 1996, Joaquin and Paulina Ruiz purchased automobile insurance from Allstate Indemnity Company ("Allstate") through an Allstate insurance company agent, Paul Cobb ("Cobb"). The policy covered the couple's 1992 Chevrolet Blazer. (R. Doc. #3, p.2) Approximately two months later, Paulina Ruiz purchased an Oldsmobile Cutlass and contacted Cobb to add the Cutlass to the policy. Instead, Cobb removed the Blazer from the policy and replaced it with the Cutlass. (R. Doc. #3, p.2)

On December 27, 1996, Joaquin Ruiz was involved in an automobile accident while driving the Chevrolet Blazer. (R. Doc. #3, p.3)

The following day, December 28, 1996, Mr. Ruiz reported the accident to Paul Cobb, Allstate Indemnity Company, Allstate Insurance Company, and Allstate adjuster Mary Jidy. (R. Doc. #3, p.3) Ruiz made a claim under the collision coverage of the policy for property damage to the Blazer. The claim was investigated, reviewed and adjusted by Mary Jidy. (R. Doc. #3, p.3)

On January 17, 1997, Allstate Indemnity denied coverage on the basis that the Blazer was not covered under the policy. (R. Doc. #3, p.3) As the Blazer was not operable, Mr. and Mrs. Ruiz were forced to spend personal funds to repair the vehicle. (R. Doc. #3, p.4)

In May 1997, counsel for the Ruiz's sent a Civil Remedy Notice for bad faith, pursuant to §624.155, Florida Statutes, to the Florida Department of Insurance, Allstate Insurance Company and Allstate Indemnity Company, setting forth specific statutory violations. (R. Doc. #3, pp. 26-31) The Civil Remedy Statute provides for a 60 day period during which an insurer may cure the violations set forth in a notice.[1] Allstate did not cure the violations within the 60 day period.

B. <u>The Lawsuit</u>

In September 1997, Joaquin and Paulina Ruiz sued Allstate Indemnity Company and Allstate Insurance Company for bad faith, pursuant to §624.155, Fla. Stat. Plaintiffs also sued Paul Cobb for negligence. (R. Doc. #3, pp. 1-23) Approximately three weeks after the suit was filed, on October 6, 1997, Allstate agreed to extend coverage to Mr. and Mrs. Ruiz for the December 27, 1996 accident involving the Blazer. On June 26, 1998, Allstate paid the property damage claim.

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[1] *Talat v. Aetna Insurance Co.*, 753 So.2d 1278 (Fla. 2000).

In responding to Plaintiffs' Third Amended Complaint, Allstate Indemnity denied Plaintiffs' allegations of bad faith and asserted specific defenses. In particular, in its Answer, Allstate asserted as a defense that: "***Under the totality of the circumstances*** . . . Defendant has not failed to pay Plaintiffs' claim when it could and should have." (Emphasis added.) (R. Doc. #11, App. p. 6) Allstate also asserted that "when considering the substance of the dispute and weight of factual and expert authority under dispute, the Defendant did not act in bad faith." (R. Doc. #11, App. 6) As an additional defense, Allstate alleged that: "***When considering Defendant's diligence and thoroughness in investigating the facts pertinent to Plaintiffs'*** claim in considering Plaintiffs' conduct, Defendant did not act in bad faith." (Emphasis added.) (R. Doc. #11, App. p. 6)

C. <u>Discovery</u>

During the proceedings below, the Plaintiffs propounded discovery seeking, among other things, Allstate's claim files pertaining to Plaintiffs' claim for coverage and benefits for the Chevrolet Blazer. See Plaintiffs' Second Request for Production to Defendants Allstate Insurance Company and Allstate Indemnity Company, served on July 27, 1998. (Appendix to Petitioner's Brief on the Merits, App. 2, p. 15)

Defendants' objected to the production of certain portions of the claim files and asserted a "work product privilege." (R. Doc. #3, pp. 20-21)

In support of their objections to the production of materials from the claims file, Allstate served an "Affidavit of Records Custodian" prepared by Lisa Myer, an Allstate adjuster. (R. Doc. #3, tab 3) According to Ms. Myer, Allstate had produced all records related to the Ruiz claim which were prepared prior to September 18, 1997, which is the date when Allstate learned of the lawsuit filed by Mr. and Mrs. Ruiz, except for three items:

1. A statement Allstate took of its agent, Paul Cobb, as part of its investigation of the coverage issues;

2. Allstate's computer diary and activity screens; and

3. The handwritten note from Allstate adjuster, Mary Jidy, to her manager.

Ms. Myer asserted that the computer diary and activity screens contain the mental impressions, thoughts, opinions, and evaluations of Allstate's adjusters and managers regarding the coverage issues presented by the Ruiz claim and that the note by Mary Jidy contains her mental impressions, thoughts, opinions, and evaluations of the coverage issues presented by the Ruiz claim. (R. Doc. #3, tab 3)

On May 12, 2000, the Ruizes filed an Addendum to their Motion to Compel Production of Documents, which included an Affidavit from their attorney, pursuant to Rule 1.280(b)(3), setting forth a need for the materials contained in Allstate's claim file in the preparation of Plaintiffs' bad faith case and an inability to obtain the materials by any other means.[2] (R. Doc. #3, tab 5) The Affidavit also set forth a specific need for Paul Cobb's Statement because, at his deposition, Cobb was unable to recall specific details regarding the Ruiz claim. (R. Doc. #3, tab 5) As further set forth in the Affidavit, Allstate has maintained a computer diary of its transactions with Plaintiffs, which contain chronological reports of contacts with Plaintiffs. The Ruizes do not have documentation of the contacts and the only reports of those contacts are solely within the possession of Allstate. The Ruizes need the requested discovery because it contains evidence of Allstate's bad faith which is necessary to prove their claim of statutory violation.

A hearing on Plaintiffs' Motion to Compel was held on May 16, 2000. At the hearing, Plaintiffs' attorney stipulated that he was not seeking any documents prepared

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[2] As set forth in the Affidavit, Plaintiffs' counsel was unable to make a Rule 1.280(b)(3) showing at an earlier date because Allstate refused to allow identification of claim materials at the April 26, 2000 deposition of a records custodian and claim representative Lisa Myer. Allstate did not deliver a privilege and work product log to Plaintiffs' counsel until May 11, 2000. (R. Doc. #3, tab 5)

after October 6, 1997, the date on which Allstate admitted coverage. (R. Doc. #3, tab 5, p. 1) It was Plaintiffs' position that all documents in Allstate's claim files prior to the time Allstate admitted coverage were relevant to and necessary for the prosecution of their bad faith claim.

Allstate conceded that certain portions of the claim file should be produced: "Judge, we are not saying we don't have to produce the claim file, but just not in total because we have produced a lot of documents from up to the point where the lawsuit was filed." (R. Doc. #3, tab 6, p. 4) Specifically, Allstate asserted a work product privilege for three documents which existed before the lawsuit was filed, as well as privilege for documents prepared after the lawsuit was filed and before Allstate provided coverage. (R. Doc. #3, tab 6, p. 12) Allstate also argued that the mental impressions of Allstate's employees should be protected from discovery.

The trial court reserved ruling on Plaintiffs' Motion to Compel and ordered Allstate to furnish the documents for which it claimed a privilege to the court, with an index. (R. Doc. #3, tab 6, p. 12)

Allstate complied with the order on May 23, 2000. The list of documents for which Allstate asserted a work product privilege included three items which pre-dated the filing of the lawsuit, as follows:

> Allstate computer diary and screens prepared between December 28, 1996, and October 6, 1997 (bate stamped at pgs. D. 1 - D. 61)
>
> Internal memorandum between adjuster Mary Jidy and her boss, dated January 7, 1997 (bate stamped at pgs. D. 62 - 63)
>
> Transcript of Statement of Paul Cobb, taken January 7, 1997 (bate stamped at pgs. D. 80 - 83)

(R. Doc. #3, tab 8)

After an *in camera* inspection of the documents, the trial court entered an order on June 1, 2000, which granted Plaintiffs' Motion to Compel and ruled that the documents in question were relevant to Allstate's handling of the underlying claim. The court specifically found that: "none of the documents constitute work product nor are they communications between attorney and client." (R. Doc. #3, tab 7)

Thereafter, Allstate filed a Petition for Writ Certiorari to the Fourth District Court of Appeal and argued that the requested discovery is protected work product. The Fourth District acknowledged that although an insurer's claim and litigation file typically constitutes work product, "the analysis differs . . . when an insurance company is sued for bad faith." *Allstate Indemnity Co. v. Ruiz*, 780 So.2d 239, 240 (Fla. 4th DCA), rev. granted, 796 So.2d 535 (2001).

Id.

Allstate argued that litigation was "anticipated" even at the early stages of investigation, citing *Prudential Ins. Co. of America v. Florida Dept of Ins.*, 694 So.2d 772 (Fla. 2d DCA 1997). Id.

The Fourth District rejected that position, reiterating that it distinguishes between "material prepared during the normal course of evaluating a claim and materials actually prepared 'in anticipation of litigation.'" Id. at 241. (Citing *Cotton State's Mutual Insurance Company v. Turtle Reef Associates, Inc.,* 444 So.2d 595 (Fla. 4th DCA 1984)).

The Fourth District ordered Allstate to produce the three items that were created during the initial investigation of the incident, within two weeks of the date that Mr. Ruiz reported the accident to Allstate.

> (1) Cobb's statement of January 7, 1997; (2) The computer diaries and entries from the date Ruiz reported the accident on December 28, 1996 through January 10, 1997; and (3) The internal memorandum from adjuster Mary Jidy to her boss, dated January 7, 1997.

Next, the court acknowledged the following conflict:

> We recognize that our position conflicts with decisions from other districts finding that statements are privileged and protected as work product when they were taken at a time when it was foreseeable that litigation would

> arise. See, e.g., *Prudential*, 694 So.2d 774; *McRae's Inc. v. Moreland*, 765 So.2d 196 (Fla. 1st DCA 2000). We nevertheless adhere to our ruling in *Cotton* that work product privilege attaches to documents prepared in contemplation of litigation and not for "mere likelihood of litigation."

Id.

Allstate petitioned this Court to accept jurisdiction based on that conflict, and also asserted conflict with *Kujawa v. Manhattan National Life Insurance Co.* 541 So.2d 1168 (Fla. 1989).

SUMMARY OF THE ARGUMENT

In *Kujawa v. Manhattan National Life Insurance Co.* 541 So.2d 1168 (Fla. 1989), this Court determined ***whether*** the work product doctrine applied to an insurance carrier's claims file in a first party bad faith action. This appeal presents the Court with an opportunity to decide ***how*** the work product doctrine is applied in such cases.

In addition, because of the differing approaches amongst the district courts of appeal with respect to whether the likelihood of litigation need be only "possible" or "foreseeable," as opposed to "substantial and imminent," this case presents the court with a vehicle to clarify the application of the work product doctrine to a broader range of cases.

In this Brief, we will revisit the holding below, and place that holding in proper context in light of *Kujawa*. In so doing, we will dispose of Allstate's arguments in favor of a broad application of the work product doctrine. Next, we will trace the origins and history of the work product immunity from the seminal decision of the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 496, 67 S.Ct. 385, 91 L.Ed.2d 451(1947), through the codification of that rule in Fed.R.Civ.P. 26(b)(3) in general, and in the particular context of first party insurance bad faith claims.

Finally, we will discuss the varying approaches of the federal and state courts across the country, and, ultimately, we will urge this Court to adopt a presumption that the work product immunity does not attach to an insurance carrier's claims files in first party bad faith actions until (at the earliest) such time as the carrier communicates the denial of coverage to its insured.

ARGUMENT

THIS COURT SHOULD APPROVE THE DECISION BELOW; RECEDE FROM OR CLARIFY ITS OPINION *KUJAWA v. MANHATTAN NATIONAL LIFE INS. CO.*, 541 So.2d 1168 (Fla. 1989); AND ADOPT A DEFINITIVE APPROACH FOR TRIAL COURTS TO APPLY TO CLAIMS OF WORK PRODUCT IMMUNITY IN FIRST PARTY BAD FAITH CLAIMS

Allstate's Arguments

Allstate makes three contentions in support of its argument that the Fourth District's opinion should be reversed. First, it argues that the Fourth District's opinion conflicts with *Kujawa*. Second, it argues that the district court's ruling ignores the fact that the Ruizes have also filed a claim of professional malpractice against insurance agent, Paul Cobb, and a claim of *respondeat superior* liability against his employer, Allstate Insurance Company. Third, Allstate asserts that the district court's requirement that the prospect of litigation must be "substantial and imminent" in order for the work product doctrine to apply is contrary to case law from other District Courts of Appeal in the State of Florida.

Allstate contends that the district court's opinion conflicts with *Kujawa v. Manhattan National Life Ins. Co.*, 541 So.2d 1168 (Fla. 1989). However, Allstate

misunderstands the question that was presented to and decided by this Court in *Kujawa*.[3]

Kujawa proves the observation that "[i]n law . . . the right answer usually depends on putting the right question,"[4] the court framed the issue as whether an insured asserting a cause of action for first party bad faith pursuant to Fla. Stat. §624.155 "is somehow entitled, *by the nature of the action alone*, to have work product immunity and the statutory attorney-client privilege *summarily swept aside.*" Id. at 1080. (Emphasis added.) The district court answered that question thusly:

> We see nothing in the statute (creating this cause of action) which evinces a legislative intent to abolish either work product immunity or the attorney-client privilege.

Id.

Nevertheless, the court observed that "whether all or a portion of the matter sought to be discovered is protected by the work product immunity . . . or by the attorney-client privilege . . . are matters which remain for the trial court's determination." Id.

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[3] *Kujawa*, like the present matter, came to this Court from the Fourth District Court of Appeal. See *Manhattan National Life Ins. Co. v. Kujawa*, 522 So.2d 1078 (Fla. 4th DCA 1988).

[4] *Rogers v. Helvering*, 320 U.S. 410, 413, 65 S.Ct. 173, 174, 88 L.Ed. 134, 137 (1943).

This Court reviewed the Fourth District's decision in *Kujawa* based upon conflict with *Fidelity and Casualty Ins. Co. v. Taylor*, 525 So.2d 908 (Fla. 3d DCA 1987), rev. den. 528 So.2d 1181 (Fla. 1988). After briefly discussing the progression of the case, this Court concluded:

> We have considered the arguments of the parties and amicus curiae and are persuaded that the district court was correct in concluding that an adversarial, not a fiduciary, relationship existed between the parties and that *the legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney-client privilege and work product immunity.*

541 So.2d at 1169. (Emphasis added.)

The district court's opinion in the present case does not conflict with *Kujawa*. To the contrary, the district court of appeal acknowledged that work product immunity applied to the Ruizes' request for production. The present dispute simply picks up where *Kujawa* left off. Acknowledging that the enactment of §624.155 did not abolish the work product doctrine with respect to an insurance carrier's claims file in a first party bad faith action, the *Kujawa* decision necessarily delegated to the trial court the task of determining precisely which documents constitute work product and which do not in any given document request in a first party bad faith action.

Nevertheless, we submit that bad faith actions require a specific application of the work product doctrine which, at a bare minimum, renders the insurer's initial investigation of its insured claims a fiduciary obligation, and, therefore, a task which is not typically protected by the work product doctrine.

In *State Farm Mutual Auto Insurance Company v. Laforet*, 658 So.2d 55 (Fla. 1995), this Court held that the determination of whether an insurer acted fairly and honestly towards its insured and with due regard for the insured's interest in the context of a first party bad faith claim, includes consideration of the following factors: efforts or measures taken by the insurer to resolve coverage disputes promptly, or so as to limit any potential prejudice to insured; the substance of the coverage dispute or weight of legal authority on the coverage issue; and the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage. Id. at 63. Here, each of the three items the district court ordered Allstate to produce were created within the first two weeks of the date of which Mr. Ruiz's accident was reported to Allstate, and thus reflect Allstate's diligence and thoroughness, *vel non*, in investigating the facts specifically pertinent to coverage.

In *Laforet*, this Court distinguished third party bad faith actions from first party bad faith actions because, in the former, "insurance companies took on the obligation of defending the insured, which, in turn, made insureds dependent on the acts of the

insurers . . .." Id. at 58. This placed insurers in a fiduciary relationship with their insureds "similar to that which exists between an attorney and client." Id. Next, this Court pointed out that there had been no first party bad faith cause of action under the common law because "the type of fiduciary duty that exists in third party actions is not present in first party actions and the insurer is not exposing the insured to excess liability." Id. at 59. We submit that the distinction which this Court has drawn between the relationship of the insured and insurer vis-a-vis one another in a first party versus third party bad faith action should be revisited.

It is certainly true that the bad faith conduct of a first party insurance carrier cannot, by definition, expose its insured to an "excess judgment" in favor of a third party plaintiff. Nevertheless, a first party insurer's bad faith refusal to provide coverage or otherwise pay claims submitted by its insureds, can and does subject its insureds to all manner of financial peril that is no less devastating than any "excess judgment."

For instance, in a fire loss or property damage claim, an insurance carrier's bad faith refusal to pay a claim could result in the inability of the insured to keep her business afloat. See *Rinaldi's*, 123 F.R.D. 198, 200 (M.D. N.C. 1988) ("because the . . . claim went unpaid, plaintiff had to seek Chapter 11 protection from the United States Bankruptcy Court."). The bad faith failure to extend coverage under a health

insurance policy could result in the depletion of personal assets to pay for medical treatment or - - in a worse case scenario - - death, where the insured has no funds by which to obtain necessary medical treatment.

First party insureds are every bit as much at the peril of their insurance carrier's bad faith conduct as are insureds who are sued by third parties. Accordingly, the same fiduciary duty which exists between a third party insurer and its insured also exists in a first party scenario.[5]

Ironically, from the standpoint of "anticipating litigation," insurance carriers in first party bad faith actions should enjoy less work product immunity than third party insurance carriers, not more. When a first party claim between an insured and his or her insurer is at issue, the insured is seeking payment under the terms of the insurance contract, and the insurance company owes its insured a duty to adjust her claim in good faith. There is no initial contemplation of litigation. By contrast, when the insurer investigates a third party claim, the investigation is made in anticipation of claims which, if denied, will likely lead to litigation. See, e.g., *Tayler v. Traveler's Insurance Company,* 183 F.R.D. 67, 71 (N.D. N.Y. 1998); *Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D.Colo. 1993).

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[5] See generally, the Amicus Brief submitted on behalf of United Policyholders.

Allstate's concerns about the effect of production of the disputed discovery on the claim against insurance agent Paul Cobb are no longer valid, if they ever were, in light of *Blumberg v. USAA Casualty Ins. Co.*, 790 So.2d 1061 (Fla. 2001), in which this Court held that an insured's cause of action against an insurance agent for negligent failure to procure insurance does not accrue until the underlying proceeding against the insurer becomes final. Accordingly, the insurance agent can move to abate the Ruizes' claim against him individually.

Allstate argues that Florida Rule of Civil Procedure 1.280(b)(3), which governs work product doctrine "has no requirement that the anticipated litigation be imminent or that the possibility of litigation be substantial." (Petitioner's Brief p.7) This argument gets to the heart of the matter. It also begs many questions concerning the purpose, scope, and application of the work product doctrine, particularly as it is applied to first party bad faith actions.

The History of The Work Product Doctrine

The work product doctrine is scarcely a half century old, tracing its origins to *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed.2d 451 (1947). Two years later, this Court recognized the work product doctrine. *Atlantic Coastline Railroad Co. v. Allen*, 40 So.2d 115 (Fla. 1949). The doctrine was originally designed to protect written statements, private memoranda, and personal recollections prepared

or formed by an adverse party's **counsel** in the course of his legal duties. *Hickman*, 329 U.S. at 510.

Specifically, *Hickman* dealt with statements of witnesses secured by counsel in advance of trial. 329 U.S. at 495. The Court emphasized that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties' and their counsel." Id. at 510.

Fed. R.Civ.P. 26(b)(3) was adopted in 1970 to codify the holding in *Hickman v. Taylor*, and to expand the doctrine by extending protection to the work product of a party or his agents and representatives, as well as that party's attorney. See, *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 133 (S.D. Ga. 1982); *8 C. Wright & A. Miller, Federal Practice and Procedure*: Civil §2023 (1970).[6]

Defining The Contours of Work Product Immunity

Unlike the attorney-client privilege, work product "immunity" is not a privilege within the meaning of Rule 501 of the Federal Evidence Code or §90.501 of the Florida Evidence Code. Rather, "it is a tool of judicial administration, borne out of

[6] *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108 (Fla. 1970), which is perhaps this Court's most familiar and in-depth treatment of the work product doctrine, was issued several months *before* the effective date of Fed. R. Civ. P. 26(b)(3). Nevertheless, it is noteworthy that in *Surf Drugs* this Court looked to federal case law, *Hickman v. Taylor*, and commentary, *Moore's Federal Practice*, for guidance in applying the work product doctrine. *Surf Drugs*, 236 So.2d at 113.

concerns over fairness and convenience and designed to safeguard the adversarial system, but not having an intrinsic value in itself outside the litigation arena." *Pete Rinaldi's Fastfoods, Inc. v. Great American Ins. Co.*, 123 F.R.D. 198, 201 (M.D. N.C. 1988) (hereinafter "*Rinaldi's*"); *Great American Surplus Lines Ins. v. Ace Oil Co.*, 120 F.R.D. 533, 539 (E.D. Cal. 1988); *8 C. Wright and A. Miller, Federal Practice and Procedure* §2025 at 212 (1970) ("work product may be more accurately described as providing an immunity as opposed to a privilege for confidential communications").[7]

Because work product protection hinders the investigation of the truth by cloaking otherwise relevant information, much as evidentiary privileges do, its scope, like the scope of evidentiary privileges, should be given a narrow construction consistent with its purpose. *Rinaldi's, supra.* at 201. Moreover, the party requesting the protection of the work product doctrine bears the burden of proving entitlement

[7] Because Fla.R.Civ.P. 1.280(b)(3) is identical to F.R.Civ.P. 26(b)(2), it is appropriate to look to federal case law for guidance. See, e.g., *Cotton State Mutual Insurance Co. v. Turtle Reef Associates, Inc.*, 444 So.2d 595 (Fla. 4th DCA 1984) and *Smith v. Florida Power & Light Co.*, 632 So.2d 696 (Fla. 3d DCA 1996), both of which look to cases interpreting Fed.R.Civ.P. 26(b)(3) for guidance in applying Fla. R. Civ. P. 1.280(b)(2). Thirty-four states have commensurate rules that are identical to Rule 26(b)(3), while only six states have provisions that substantially differ from the federal rule. See generally, Elizabeth Thornburg, *Rethinking Work Product*, 77 Va.L.Rev. 1515 (1991)

to that protection by making an evidentiary showing, if necessary. Id. *First City Developments of Florida, Inc. v. The Hallmark of Hollywood Condominium Association, Inc.*, 545 So.2d 502 (Fla. 4th DCA 1989).

The threshold question in any work product analysis is whether the requested documents were produced "in anticipation of litigation." *Harper v. Auto Owners Insurance Co.*, 138 F.R.D. 655, 659 (S.D. Ind. 1991). There are two components to this threshold question. In their treatise, Professors Wright and Miller describe these components:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the documents can fairly be said to have been prepared or obtained because of the prospect of litigation. *But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.*

8 C. Wright and A. Miller, Federal Practice and Procedure, Civil §2024 at 198-99 (1970). (Emphasis added.) These components are inherently in conflict with respect to first party bad faith insurance claims.

What, then, is the proper analysis when a work product objection is raised by an insurance carrier that is being sued by its own insured? After all, such an insurance

company is, in many respects, in the ***business*** of investigating whether it will extend coverage to its insureds. Many courts have acknowledged the peculiar application of these principles to first party bad faith actions:

> An insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate, and make a decision with respect to claims made on it by its insureds.

Rinaldi's, *supra*., at 202; *Harper v. Auto Owners Insurance Co.*, 138 F.R.D. 655, 662 (S.D. Ind. 1991) ("an insured seeking documents and reports in his insurer's claims file presents a special problem for application of the work product rule because it is the very nature of an insurer's business to investigate and evaluate the merits of claims . . . most courts have held that documents constitute any part of a factual inquiry into or evaluation of a claim, undertaken in order to arrive at a claim decision, are produced in the ordinary course of an insurer's business and not work product."); *Mission National Ins. Co. v. Lilly*, 112 F.R.D.160, 164 (D.Minn. 1986) (such investigation is the routine business of an insurance company); *Tackett v. State Farm Fire and Casualty Ins. Co.*, 653 A.2d. 254, 263 (Del. 1995). ("The processing of the claim by an insurer is almost entirely an internal operation and its file reflects that unique, contemporaneous record of the handling of the claim. The need for such

information is 'not only substantial, but overwhelming'") (quoting, *Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725 (Ariz. 1989)).

The Various Approaches to Application of the Work Product Doctrine in First Party Bad Faith Actions

Actions seeking recovery for bad faith under first party medical, disability, casualty, and life policies are a relatively recent development and an increasingly common cause of action. *Tackett v. State Farm Fire and Casualty Ins. Co.*, 653 A.2d 254, 261 (Del. 1995); *Allen O. Sykes, "Bad Faith" Breach of Contract by First Party Insurers*, 25 J. Legal Stud. 405, 406 (1996). In first party actions, an insured alleges that the insurer refused, without sufficient justification, to pay benefits owed under the policy, thereby forcing the insured to litigate to obtain them. *Sykes, supra*. at 406. Not surprisingly, a considerable body of case law and commentary has developed concerning application of the work product doctrine in first party bad faith actions.

Much jurisprudential water has also flowed over the work product dam since the enactment of Fed.R.Civ.P. 26(b)(3) in 1970, and a considerable reservoir of case law and commentary has accumulated. The vast majority of the case law is federal since federal courts exercising their diversity jurisdiction apply Fed.R.Civ.P. 26(b)(3)

rather than its respective forum state counterparts.[8] Nevertheless, a number of state courts have also recently addressed the application of the work product doctrine in first party bad faith actions. In this next section of the Brief, we will address the various approaches taken by the courts.

One commentator has identified five distinct approaches. See, Mary Beth Brookshire Young, *The Work Product Doctrine: Functional Considerations and the Question of the Insurers' Claim File*, 64 U.Chi.L.Rev.1425 (1997) (hereinafter "*Young*"). At the outset of her scholarly article, *Young* observed:

> When a party opposes an insurer in litigation, access to the claim file is often a critical issue. The claim file is the best and most obvious record of both the underlying facts and the insurer's handling of the claim. The extent to which it is discoverable may determine whether the case goes forward and which party ultimately prevails. Because the claim file is so valuable, insurers vigorously seek to protect it from discovery. Their most effective shield is the work product doctrine.

Id., at 1425.

[8] However, as we note elsewhere, the vast majority of states have codified work product rules which are virtually identical to Fed.R.Civ.P. 26(b)(3).

Young identified five "general approaches" to the "anticipation of litigation" threshold determination to be used in applying the work product doctrine to first party bad faith actions.[9] We will briefly describe each approach.

The "Ordinary Course of Business Exception"

This line of cases holds that because materials prepared in the ordinary course of business will not be considered to have been prepared in anticipation of litigation, very little of the claims file should be protected because "the evaluation of claims of its policyholders is the regular, ordinary, and principle business" of an insurer. *Atlanta Coca Cola Bottling Co. v. TransAmerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972); see also, *Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 328 (D. Mont. 1988) ("where the contested material is prepared with a primary motive of assisting in a party's day-to-day business, the material is not protected trial preparation even if there exists a likelihood of ultimate litigation"); *Western National Bank v. Employer's Ins. of*

[9] Undoubtedly, many other "approaches" could be discerned from the case law. The phrase "in an anticipation of litigation" has been characterized as "deceivingly simple,"*United States v. Ernstoff*, 183 F.R.D. 148, 155 (D.N. J. 1998), yet ultimately "incapable of precise definition." *Leonen v. Johns-Manville*, 135 F.R.D. 94 (D.N. J. 1990). In *Surf Drugs, supra*., this Court acknowledged that "[w]hat constitutes 'work product' is incapable of concise definition adequate for all occasions, " 236 So.2d at 112.

Wausau, 105 F.R.D. 55, 57 (D.Colo. 1985) (an insurance carrier's 'factual investigation of claims" are within the "ordinary course of business" exception).

In our opinion, determining whether a document was created in the "ordinary course of business" is not truly an "exception" to the work product doctrine, nor should it be categorized as one of several alternative approaches available to courts. Rather, determining whether a document was prepared in the "ordinary course of business" is an important component of the definition of work product itself. See, *Wright & Miller*, §2024, *supra*. See also *Advisory Committee Notes to Rule 26(b)(3)* ("materials assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation or for other non-litigation purposes are not under the qualified immunity provided by this sub-division"). Accordingly, the"ordinary course of business" analysis applies to all claims of work product protection. However, its application is particularly important in first party bad faith actions in light of the very nature of the duties imposed upon insurance carriers by law and by contract. See, e.g., *Rinaldi's, supra.*

The Broad Protection Approach

This is the approach embraced by Allstate. According to this approach, the work product doctrine requires only that a document be prepared in anticipation of litigation, regardless of whether that is the sole or even primary motivation for the

prevention of the document. It is the antithesis of the " ordinary course of business" analysis. *Young*, at 1430. See, e.g., *Almaguer v. Chicago, Rock Island and Pacific Railroad Co.*, 55 F.R.D. 147, 149 (D.Neb. 1972) (statements obtained by defendants claim agent as part of a routine accident investigation and in anticipation of a possible claim were protected by the work product doctrine).

This is also the approach taken in the cases with which the district court cited conflict. None of those cases, however, includes a first party bad faith claim. See, e.g., *McRae's, Inc. v. Moreland*, 765 So.2d 196, 197 (Fla. 1st DCA 2000) (the statements were protected by work product doctrine because "at the time the statements were taken, it was *foreseeable* that litigation could arise"); *Prudential Ins. Co. of America v. Florida Dept. of Ins.*, 694 So.2d 772, 774 (Fla. 2d DCA 1997) ("even preliminary investigative materials are privileged if compiled in response to some event which *foreseeably* could be made the basis of a claim."). See also, *Beverly Enterprises Florida, Inc. v. Olvera*, 734 So.2d 589 (Fla. 5th DCA 1999) (in non-insurance case, court found documents protected by work product because they were "prepared in anticipation of *possible* litigation"). (Emphasis added in each.)

The absence of meaningful work product analysis in these cases is troublesome. None of the three cases demonstrate any consideration of the fact that documents

prepared in the ordinary course of business are not protected by the work product doctrine.

As a practical matter, in this day and age, litigation can be "anticipated" at the time almost any incident occurs. Accordingly, most courts have interpreted the rule to require more substantial and specific threat of litigation before the work product privilege attaches:

> There are many formulations of this level of threat, but the cases generally concur that a party must show more than a "remote prospect," an "inchoate possibility" or a "likely chance" of litigation . . . Rather, a party must demonstrate that . . the probability of litigation is "substantial and imminent" .. .

Harper v. Auto Owners Ins. Co., 138 F.R.D. 655, 659-60 (S.D. Ind. 1991) (citing *inter alia*, *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982). Accordingly, the Fourth District Court of Appeal's approach is in line with the vast majority of courts in this country, which have rejected the approaches like those of the First, Second, and Fifth District Courts of Appeal which would accord the work product immunity to documents prepared when litigation is only "possible" or "foreseeable." These principles apply to all litigation, not just first party bad faith actions.

Moreover, *McRae's* fails to take into account the committee notes accompanying the 1970 Amendment to Fed.R.Civ.P. 26(b)(3) which provide that witness statements may be discoverable because "the witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter."). This was precisely the situation with agent Paul Cobbs' statement. In his deposition testimony in the bad faith action, Mr. Cobb could recall very few details. Accordingly, access to the contemporaneously recorded written statement is both necessary and appropriate.

At any rate, the "broad protection approach" has been almost universally rejected in the context of first party bad faith insurance claims. Were the rule otherwise, "documents prepared by or at the request of an insurance company during the insurance company's ordinary business of claim handling would shield from discovery all documents falling within that category with a ritualistic incantation of 'anticipation of litigation.'" *Insurance Company of North America v. M/V Savannah*, 1995 WL 608295, at *1(S.D. N.Y., October 17, 1995). See, e.g., *Harper , supra*. 138 F.R.D. at 568 (rejecting property insurance carrier's argument that it anticipates litigation whenever a fire is incendiary in origin).

Adopting the "broad protection approach"which would generally deny access to claims files, "may have the troublesome side-effect of discouraging suits against insurers, leaving insurers unaccountable." *Young*, at 1447.

The Direction of Counsel Rule

A few courts have narrowly construed the "anticipation of litigation" requirement to hold that only the portions of the claim file prepared at the direction of counsel are protected. *Young*, at 1431. For instance, in *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972) the court held that reports that do not involve legal expertise are conclusively presumed to have been prepared in the ordinary course of business. See also, *Westhemco, Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D. NY. 1979), modified on other grounds, *Commercial Union Ins. Co. v. Albert Pipe and Supply Co.*, 484 F.Supp. 1153, 1154 (S.D. NY. 1980). Of course, application of this rule is subject to abuse by insurance carriers which might prophylactically assign investigation of all claims to attorneys if the rule were adopted. See, e.g., *St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000) (insurer cannot shield its entire claims investigation behind the work product privilege simply by hiring an attorney to perform what is in the ordinary course of insurer's business). For obvious reasons this rule has not gained general acceptance.

The Ad Hoc or Case-by-Case Approach

The case-by-case approach seeks to determine whether "in light of the factual context" of each case, the requested documents can fairly be said to have been

prepared or obtained because of the prospect of litigation. *Young*, at 1432. This is the approach utilized in *Carver*, *supra*, upon which the Fourth District of Appeal relied. Under this approach, courts focus upon when the prospect of litigation became "substantial" or "identifiable." See *Travelers Indemnity Co. v. Allied Signal, Inc.*, 124 F.R.D. 101, 102 (D. Md. 1989); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134-35 (S.D. Ga. 1982). See also, *Mount Vernon Fire Ins. Co. v. Platt*, 1999 W.L. 892825 (S.D. N.Y.); *ex-parte State Farm Mutual Automobile Ins. Co.*, 761 So.2d 1000 (Ala. 2000); *Tackett v. State Farm Fire and Casualty Ins. Co.*, 653 A.2d 254 (Del. 1995). See also, *6 Moore's Federal Practice*, §26.70 (3rd Ed. 1998) (recommending the "case-by-case approach").

The *Carver* court explained its application of the case-by-case approach as follows:

> In the early stages of claims investigation, management is primarily concerned not with the contingency of litigation, but with "deciding whether to resist the claim, to reimburse the insured and seek subrogation of the insured's claim against the third party, or to reimburse the insured and forget about the claim thereafter." . . . At some point, however, an insurance company's activity shifts from mere claims evaluation to a strong anticipation of litigation. . . . This is the point where the probability of litigating the claim is substantial and imminent. . . . The point is not

> fixed, it varies depending on the nature of the claim, and the type of investigation conducted. . . . The decision whether insurance company investigatory documents were "prepared in anticipation of litigation" turns, therefore, on the facts of each case.

Carver, 94 F.R.D. at 134 (citations omitted.)

The "case-by-case" approach has also been the subject of much commentary. See Brian Woodward, *Note, Work Product Discovery in Insurance Litigation*, 18 Ind. L.Rev. 547 (1985); Robert H. Oberbillig, *Note, Work Product Discovery: A Multi-Factor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3),* 66 Iowa L. Rev. 1277 (1981).

Nevertheless, the case-by-case approach is subject to valid criticism. See, e.g., *Clausen v. National Grange Mutual Ins. Co.*, 730 A.2d 133, 142 (Del. 1997) (the case-by-case approval is "troublesome" in light of the time constraints placed upon trial courts). See also, *Young, supra*. at 1446 ("the ad hoc approach has high administrative costs . . . because courts must carefully examine the facts of each case, rather than employ a "cut-off" for what constitutes anticipation of litigation in the insurance context.").

The Claim Denial Presumption Approach

According to this approach, any investigation undertaken *before* a claim is officially denied is presumed not to be in anticipation of litigation, while any investigation undertaken *after* claim denial is presumed to have been done in anticipation of litigation.[10] *Young*, at 1431. This approach evolved in large part due to the difficulty in determining precisely when the possibility of litigation becomes sufficiently definite to be considered "anticipated" under the case-by-case approach. See, e.g., *Mount Vernon Fire Ins. Co. v. Try 3 Building Services, Inc.*, 1998 WL 729735 (S.D. N.Y.).

The claim denial presumption is perhaps the most widely accepted application for the work product doctrine in first party insurance bad faith cases. See, e.g., *Harper v. Auto Owner's Ins. Co.*, 138 F.R.D. 655 (S.D. Ind. 1991) (and cases therein) *Pete Rinaldi's Fastfoods, Inc. v. Great American Ins. Co.*, 123 F.R.D. 198 (M.D. N.C. 1988). *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160 (D. Minn. 1986).

An increasing number of state courts have also adopted this approach. See, e.g., *Boone v. Van Liner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001), cert. den. 2001 WL 985130; ("we hold that in an action alleging bad faith denial of insurance coverage, the

[10] The rule can also be applied where the carrier has paid the claim, albeit belatedly. See generally, Amicus Brief filed by United Policyholders.

insurer is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. At that stage of the claims handling, the claims file materials will not contain work product, i.e., things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists."); *Evans v. United Services Automobile Association*, 541 S.E.2d 782, 790 (N.C. Ct. App. 2001).

As the court in *Rinaldi's, supra*, observed "when the claim is made by its insured, an insurance company cannot in good faith contend that there is a reasonable possibility of litigation with respect to every claim submitted to it." 123 F.R.D. at 202.

The *Rinaldi* court also observed that:

> Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection. 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.

Id.

In cases where an insurer argues that it acted in anticipation of litigation *before* it formally denied the claim, it bears the burden of proof on theat point. Id.

A Recommended Approach: A Combination of the "Ordinary Course of Business" and the "Denial of Claim Presumption" Approaches

In our opinion, any credible approach to the issue of the application of the work product doctrine in first party bad faith claims must recognize the overriding principle that documents prepared in the ordinary course of business are not work product, and that insurance companies, which are required by law and contract to investigate first party claims in good faith, are in the ***business*** of undertaking such investigations. See, e.g., *Rinaldi's*, *supra*. Accordingly, documents prepared during the course of claim investigation and analysis should be ***presumptively discoverable***. But where to draw the line?

The "claim denial presumption" offers a workable and cost effective mechanism that can be applied easily by trial courts. This approach conforms to the U.S. Supreme Court's description of the work product doctrine as an "intensely practical one, grounded in the realities of litigation and our adversary system." *United States v. Nobles*, 422 US 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975). The only readily observable drawback to this approach is the prospect that insurance carriers will prematurely (indeed preemptively) deny claims in order to avoid the inevitable claims file discovery request. The counter-balance to that tendency, however, is the fact that insureds whose claims were preemptively or prematurely denied on such

grounds may have no need of the claims file in order to establish bad faith: the carrier's preemptive or premature denial will, in and of itself, constitute bad faith.

CONCLUSION

Accordingly, we urge this Court to approve the decision of the district court below. In addition, we urge this Court to recede from and/or clarify its opinion in *Kujawa*, by adopting a presumption in favor of discoverability of claims files in first party bad faith actions, at a minium up until the time of the insurance carrier's communication to the insured of a full and final rejection of the insured's claim or, alternatively, its belated decision to pay the claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was forwarded via U.S. Mail on **December 12, 2001**., to:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certifies that this Initial Brief has been prepared in Times New Roman 14 Point.

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