

Insurance Companies and Work Product Immunity Under Indiana Trial Rule 26(B)(3): Indiana Adopts a Fact-Sensitive Approach

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I. INTRODUCTION

In 1985, the Indiana Court of Appeals announced a decision of special significance to insurers and attorneys involved in disputes over insurance claims. Prior to *CIGNA-INA/Aetna v. Hagerman-Shambaugh*,¹ parties to claims disputes confronted a particular discovery question without the benefit of an Indiana case setting forth guidelines for resolving the issue.² The question involves the application of the work product privilege to a situation in which a claimant whose claim has been denied seeks to discover all of the materials compiled by the insurer in the process of making its determination regarding coverage of the claim.³

A person whose claim has been denied may bring an action against the insurer for a bad faith refusal to pay. In order to prove the allegation of bad faith, particularly in light of the high standard for a recovery of punitive damages,⁴ it is crucial for the claimant to gain access to the documents most likely to demonstrate bad faith on the part of the insurer.

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¹473 N.E.2d 1033 (Ind. Ct. App. 1985) (*trans. denied*, Sept. 20, 1985).

²The *Hagerman* court was quick to point out that *Newton v. Yates*, 170 Ind. App. 486, 353 N.E.2d 485 (1976), involved similar issues but failed to provide any answers.

³Indiana Trial Rule 26(B)(3) states the work product privilege in the following language:

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his 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 his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

For an extensive analysis of the issue and the approaches to this discovery problem, see Note, *Work Product Discovery in Insurance Litigation*, 18 IND. L. REV. 547 (1985) [hereinafter cited as Note, *Work Product*].

⁴In *Travelers Indemnity Co. v. Armstrong*, 422 N.E.2d 349 (Ind. 1982), the court restricted the availability of punitive damages by holding that an insured must first demonstrate with clear and convincing evidence that the insurer's conduct was fraudulent, deceitful, or oppressive. This standard has since been codified. See IND. CODE § 34-4-34-2 (Supp. 1985).

At this point, the standard for discovery set forth in Indiana Trial Rule 26(B)(3) becomes applicable. Under this rule, materials prepared in anticipation of litigation have limited immunity from discovery. If a court determines that the insurer prepared the items with the requisite eye toward litigation, the claimant is entitled to discovery only if it can be shown that there is a substantial need for the materials and that the substantial equivalent cannot be obtained absent undue hardship. In addition, if a document was prepared in anticipation of litigation, mental impressions and conclusions contained in the document are absolutely immune from discovery.⁵

A. Policies Behind the Limited Immunity Given to Work Product

These rules stem from two general policies. On the one hand, the discovery process is designed to permit the parties to have access to all potentially significant information to prepare adequately for trial. Conversely, each party is encouraged to compile the materials and develop the strategy supporting the party's position without fear that an opponent will be permitted to gain access to and take advantage of the work. The balancing of these two policies was discussed extensively in *Hickman v. Taylor*,⁶ the landmark Supreme Court case delineating certain restrictions on the discovery of an attorney's work product.

In *Hickman*, the Court determined the extent to which a plaintiff in a tort action could discover statements obtained by the defendant from persons involved in the accident.⁷ Recognizing that public policy supports reasonable and necessary inquiries into files and records prepared by another party, the Court discussed several policy considerations for placing restrictions on discovery. First, written records are necessary to maintain accuracy and efficiency in the litigation process, and attorneys should be encouraged to maintain such materials without fear that strategic information will be disclosed.⁸ In addition, liberal discovery would enable parties to take advantage of the work of others or even encourage some to prepare misleading materials designed to deceive those requesting them.⁹ As a whole, it was clear that unrestrained discovery of work product would have an adverse effect on the interests of clients and the administration of justice.¹⁰ Those policies, now incorporated in Federal Rule of Civil Procedure 26(b)(3),¹¹ are also reflected in Indiana Trial Rule 26(B)(3).

⁵IND. R. TR. P. 26(B)(3).

⁶329 U.S. 495 (1947).

⁷*Id.* at 498, 499.

⁸*Id.* at 511.

⁹The Court referred to such tactics as "sharp practices." *Id.*

¹⁰*Id.*

¹¹See *Upjohn Co. v. United States*, 449 U.S. 382, 398 (1981).

B. Approaches to the Problem

For several years in Indiana, a question remained concerning the balance to be struck between the need for disclosure and the need to protect work product in the context of disputes over insurance coverage. As recognized by the courts, insurers are naturally in the business of anticipating litigation.¹² The uncertainty arises concerning the point at which that anticipation is sufficient to warrant the application of work product immunity.¹³ Approaches to the problem vary. The majority of courts dealing with the problem have taken the position that the expectation of litigation must be such that an attorney has become involved in the dispute and has prepared the documents himself or has requested their preparation.¹⁴ Until such attorney involvement takes place, none of the items is immune from discovery.

A small minority of courts, on the other hand, provide much broader protection to materials prepared by an insurer, holding that all statements and information secured by an insurer after an event which may expose the insurer or its insured to a claim are protected by work product immunity.¹⁵ Such a view emphasizes the litigious nature of our society and holds that an insurer's notice of a potential claim indicates that the "seeds of prospective litigation" have been sown.¹⁶ Courts have been extremely critical of this blanket approach in light of the hardship imposed upon claimants who need more information to prepare their cases adequately.¹⁷

In 1985, Indiana refused to follow either of the two approaches above and instead chose to adopt a third approach which appears to

¹²See *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982); *Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147, 149 (D. Neb. 1972); *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84, 89 (R.I. 1978).

¹³The courts have different ways of describing the necessary degree of anticipation. See *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) (must be "some possibility" of litigation); *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga. 1977) (must be a "substantial probability that litigation will occur and that commencement of such litigation is imminent"); *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969) (prospect of litigation must be "identifiable").

¹⁴*McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115 (N.D. Ga. 1972); *Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972); *Henry Enter., Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979).

¹⁵*Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972); *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84 (R.I. 1978).

¹⁶*Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d at 89-90.

¹⁷*Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. at 118; *Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. at 373; *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 334, 670 P.2d 725, 732 (1983) (en banc).

be gaining strength among other jurisdictions.¹⁸ Under this analysis, a court considers all of the facts surrounding the preparation of the materials in question. In particular, it is necessary to examine the way in which an insurance company conducts its business and to determine at what point the efforts of the insurer shifted “from mere claim evaluation to a strong anticipation of litigation.”¹⁹ This case-by-case approach has been criticized for its inability to provide uniformity in decisions of lower courts,²⁰ but it is unlikely to result in arbitrary determinations and is more consistent with the purposes behind protection given to materials prepared for trial.²¹ Indiana’s adoption of this view in *CIGNA-INA/Aetna v. Hagerman-Shambaugh*²² eliminated prior uncertainty regarding discovery of an insurer’s documents and established a reliable framework to be used by attorneys and judges in analyzing disputes over insurance coverage.

II. *CIGNA-INA/Aetna v. Hagerman-Shambaugh*

A. *The Facts*

*CIGNA-INA/Aetna v. Hagerman-Shambaugh*²³ arose out of an insurance policy issued on a construction project. Hagerman Construction Company (“Hagerman”) installed regulator panels as part of a project to make certain additions on a water pollution control plant. Several of the panels were damaged in a flood, and Hagerman made a claim to CIGNA-INA/Aetna (“CIGNA”) for the cost of repairing the damage. CIGNA denied coverage.²⁴

In bringing its action against CIGNA, Hagerman filed a request for production by CIGNA of “[a]ll memoranda, letters, notes or documents of any nature” relating to the claim.²⁵ In objecting to the request, CIGNA argued that production of the materials would be unduly burdensome and a violation of CIGNA’s privilege against discovery of work product. In response to this objection, the court permitted CIGNA to submit any documents it believed to be work product to the court for

¹⁸See *State Farm and Casualty Co. v. Perrigan*, 102 F.R.D. 235 (D. Va. 1984); *Klawes v. Firestone Tire & Rubber Co.*, 572 F. Supp. 116 (E.D. Wis. 1983); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 670 P.2d 725 (1983) (en banc). For an in-depth analysis of this approach and its virtues, see Note, *Work Product*, *supra* note 3, at 559-71.

¹⁹*Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982).

²⁰*McAlpine*, 391 A.2d at 89 (citing *Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975)).

²¹*Maricopa County*, 137 Ariz. at 334, 670 P.2d at 732.

²²473 N.E.2d 1033 (Ind. Ct. App. 1985) (*trans. denied*, Sept. 20, 1985).

²³*Id.*

²⁴*Id.* at 1034.

²⁵*Id.*

in camera inspection.²⁶ The day after CIGNA submitted seven documents, the court announced its decision that the items were relevant to Hagerman's claim, unprotected by the attorney-client privilege, and not prepared in anticipation of litigation. In addition, the court concluded that the materials were discoverable despite the fact that they contained conclusions and opinions.²⁷

On CIGNA's interlocutory appeal, the Indiana Court of Appeals affirmed the trial court's decision, taking the opportunity to establish clearer guidelines for the discoverability of materials prepared by insurers in response to claims. The court focused its analysis upon the rules concerning relevancy and work product found in trial rule 26(B)(1) and (3).²⁸ The court first noted that the materials in question were relevant so long as there was a possibility that the information Hagerman sought would be relevant to the claim.²⁹ Trial courts are given a great deal of discretion in questions regarding discovery,³⁰ and the court of appeals could do little more than conclude that the trial court had not reached a clearly erroneous decision.³¹

Next, the court examined the relevancy of the materials to Hagerman's claim for punitive damages based on the theory that CIGNA denied the claim in bad faith. Under a policy of liberal discovery, courts are more likely to conclude that "[t]he information sought will to some degree demonstrate the thoroughness with which [the insurer] investigated and considered [the] plaintiff's claim and thus is relevant to the question of the good or bad faith of [the insurer] in denying the claim."³² CIGNA argued that liberal discovery of an insurer's file whenever a claimant alleged bad faith would discourage insurers from conducting full and open investigations of claims for fear that production of such materials would assist a claimant in proving the allegations of bad faith. In particular, CIGNA was concerned that documents indicating uncertainty regarding coverage would support the claim for punitive damages.³³

In response to this argument, the court emphasized Indiana's commitment to preventing "awards of punitive damages against insurers who in good faith pay only the amount required under the policy."³⁴ The

²⁶*Id.*

²⁷*Id.* at 1035.

²⁸*Id.* at 1036.

²⁹*Id.*

³⁰*Condon v. Patel*, 459 N.E.2d 1205 (Ind. Ct. App. 1984); *Constanzi v. Ryan*, 175 Ind. App. 257, 370 N.E.2d 1333 (1978).

³¹*CIGNA-INA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d at 1036 (Ind. Ct. App. 1985) (trans. denied Sept. 20, 1985).

³²*Id.* (quoting *Atlanta Coca-Cola Bottling*, 61 F.R.D. at 117 (N.D. Ga. 1972)).

³³473 N.E.2d at 1036.

³⁴*Id.* (citing *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d

court went on to hold that expressions of uncertainty as to coverage, if made in good faith, will not provide grounds for an award of punitive damages.³⁵ Insurers are not likely to be discouraged from conducting a full and open investigation because such a failure itself could lead to an inference that the insurer acted in bad faith.³⁶

B. Work Product

Of greatest significance to insurance companies and attorneys involved in disputes regarding coverage is the court's analysis regarding whether materials such as those prepared by CIGNA were prepared in anticipation of litigation so as to fall within the work product immunity of trial rule 26(B)(3). The court first discussed the effect of the existence of mental conclusions and opinions in requested documents. Claims files naturally contain opinions and recommendations as to whether particular claims are covered, but, as noted by the court of appeals, even those mental impressions are discoverable if the documents themselves were not prepared in anticipation of litigation.³⁷ Even if the materials do fall within the work product privilege, the claimant can still gain access to them if the claimant establishes a substantial need for the materials and an inability to obtain substantially equivalent information absent undue hardship; this, of course, does not affect the absolute privilege accorded to an attorney's mental impressions or theories by rule 26.³⁸

Having recognized the necessity of an anticipation of litigation on the part of the insurer, the court next faced the difficult determination as to when there is a sufficient link between the prospect of litigation and the preparation of the materials in question.³⁹ Of the various formulas available for the determination, the court chose to look to Wright and Miller for the best solution.⁴⁰ According to Wright and Miller, the test is " 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation.' " ⁴¹

Noting that application of this test to materials prepared by insurance companies is especially difficult, the court looked to decisions from other jurisdictions. By examining the process by which an insurer reaches a

173 (1976)); *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Continental Casualty Co. v. Novy*, 437 N.E.2d 1338 (Ind. Ct. App. 1982).

³⁵473 N.E.2d at 1037.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* The court referred to 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970).

⁴¹473 N.E.2d at 1037 (quoting 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 198 (1970)) (emphasis added by the court).

decision regarding coverage, a court can reasonably determine the point at which the insurer's activity shifts from mere evaluation of a claim to the point at which the prospect of litigation is substantial and imminent.⁴² Such a determination is fact-sensitive. The court made it clear that it was rejecting the rule of some jurisdictions that the filing of a claim triggers an insurer's anticipation of litigation.⁴³ Rather, the court selected the reasoning in *Carver v. Allstate Ins. Co.*,⁴⁴ as elaborated upon in several exemplary cases,⁴⁵ for the approach to be taken regarding the documents requested by Hagerman. Because of the court's limited scope of review, the opinion merely concludes that the trial court could correctly have concluded that the seven documents were not prepared with the requisite anticipation of litigation.⁴⁶

The court of appeals closed its opinion with a brief discussion of the two competing policies in this area of the law.⁴⁷ On the one hand, the discovery process is designed to prevent a party from withholding important facts to which the other party is entitled when preparing for trial. On the other hand, a lawyer putting forth the effort for trial should not be hampered by fears that an opponent will gain access to and benefit from the product of that effort.⁴⁸

CIGNA took the position that insurance companies should receive blanket protection from such discovery anytime a claim is filed.⁴⁹ The court noted that such immunity from discovery would relieve insurers of the usual obligations designed to prevent the discovery process from being an opportunity for a party to benefit from the withholding of critical information.⁵⁰ The fact that insurers deal with claims that have the potential to lead to litigation does not in itself warrant the limited immunity afforded under trial rule 26(B)(3).⁵¹ Based upon the facts of the case, the court found that CIGNA had not anticipated the litigation at the time it prepared the seven documents, and Hagerman was permitted to discover them.

⁴²473 N.E.2d at 1038.

⁴³*Id.* at 1039.

⁴⁴94 F.R.D. 131 (S.D. Ga. 1982).

⁴⁵473 N.E.2d at 1038-39. The court of appeals summarized the facts and holdings in several decisions involving similar issues. See *State Farm Fire and Casualty Co. v. Perrigan*, 102 F.R.D. 235 (D. Va. 1984); *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420 (S.D.N.Y. 1981); *APL Corp. v. Aetna Casualty & Surety Co.*, 91 F.R.D. 10 (D. Md. 1980).

⁴⁶473 N.E.2d at 1039.

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

III. CONCLUSION

*CIGNA-INA/Aetna v. Hagerman-Shambaugh*⁵² is not significant for the result reached by the courts involved. Instead, the impact of the case lies in its establishment of the general guidelines to be used by judges and parties when dealing with the discoverability of materials prepared by an insurance company in response to a claim. Naturally, the fact-sensitive approach used by the court of appeals will not result in the quick solutions provided by the absolute positions adopted in other jurisdictions.⁵³ It should be noted, however, that trial rule 26(B)(3), particularly in light of the competing interests involved, was not intended to bring a quick resolution to the question of whether requested materials were prepared in anticipation of litigation. Rather, the rule was designed to permit parties to prepare adequately for trial by permitting discovery of all relevant information while at the same time protecting those items prepared with the expectation that a lawsuit will ensue.⁵⁴

Even so, depending upon the number of documents in question, the parties will not necessarily be unduly delayed while a court determines the discoverability of the items. In *CIGNA*, the trial court announced its decision the day after the insurer submitted the documents for inspection.⁵⁵ Now that the court of appeals has established the approach to be used in resolving this discovery question, trial courts and parties will be better able to distinguish between facts which indicated that the materials were prepared in the ordinary course of an insurer's business and those which indicate the requisite anticipation of litigation. In addition, the *CIGNA* court's fact-sensitive approach will lead to results consistent with the competing policies embodied in trial rule 26(B)(3).

⁵²473 N.E.2d 1033.

⁵³The approaches which require attorney involvement or give blanket protection, discussed at *supra* notes 13-16 and accompanying text, are most likely to give immediate, though often arbitrary, answers to the problem.

⁵⁴*Hickman*, 329 U.S. at 510-12; *Maricopa County*, 137 Ariz. at 334, 670 P.2d at 732.

⁵⁵473 N.E.2d at 1035.