

Work Product Discovery in Insurance Litigation

I. INTRODUCTION

One of the major functions of an insurance company is to investigate and pay legitimate claims, as well as to defend against illegitimate claims.¹ Because of the nature of the insurance business, an insurance company must thoroughly examine the facts surrounding a claim. The task of investigation is usually performed by agents or employees who summarize the information for superiors who ultimately decide what should be the appropriate action regarding the claim.²

If the insurer refuses to pay or to settle a valid claim or decides not to defend or indemnify its insured, the insured may bring an action against the company for a bad faith breach of the insurance contract.³ To prove the bad faith allegations, the plaintiff will serve the insurance company with a request for production pursuant to the appropriate statutory provision.⁴ Generally, the production request seeks discovery of all the materials prepared or obtained by the insurer for the purpose of making its decision concerning the insured's claim.⁵ In response, the insurance company often objects to production of the materials, claiming that the items were prepared in anticipation of litigation and, therefore, are entitled to limited immunity from discovery.⁶

¹Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 118 (N.D. Ga. 1972); Ainsworth v. Union Free School Dist. No. 2, Queensbury, 38 A.D.2d 770, 327 N.Y.S.2d 873 (1972).

²Thomas Organ Co. v. Jadranska Plobozna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972). As stated by the court, appropriate action may include resisting the claim, simply reimbursing the insured, or reimbursing the insured and seeking subrogation of the insured's claim against a third party. *Id.* at 373.

³For a discussion of the insurer's liability and the damages which an insured may recover, see Note, *The Tort of Bad Faith: A Perspective Look at the Insurer's Expanding Liability*, 8 CUM. L. REV. 241 (1977); Note, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co.*, 25 HASTINGS L.J. 699 (1974).

⁴FED. R. CIV. P. 34(a). This rule provides in part:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served

Id. See FED. R. CIV. P. 37(a). This rule states, "A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery" *Id.* See also IND. R. TR. P. 34, 37 (containing equivalent provisions).

⁵For an example of the materials typically sought, see *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 330-31 n.3, 670 P.2d 725, 728-30 n.3 (1983) (en banc).

⁶The "limited immunity" requires the requesting party to show at least a substantial need for the items, with resulting undue hardship if the substantial equivalent must be obtained elsewhere.

The rules of civil procedure concerning discovery serve as the foundation for determining what materials, if any, are available to the requesting party. Under Federal Rule of Civil Procedure 26(b)(3), a party has limited immunity from discovery of documents and other tangible items that were prepared in anticipation of litigation by or for a party or his representative.⁷ The limited immunity provided by federal rule 26(b)(3) is commonly referred to as the work product doctrine.

This Note will examine the policies behind the work product doctrine and the factors used in analyzing whether or not requested materials were prepared in anticipation of litigation. Next, the problems which currently face insurers and claimants and the various approaches to the application of federal rule 26(b)(3) to insurance litigation will be discussed. This Note will demonstrate why a balanced approach is the better view for the fair and consistent resolution of such discovery disputes.

II. POLICIES AND FACTORS FOR APPLYING FEDERAL RULE OF CIVIL PROCEDURE 26(B)(3)

In the landmark decision of *Hickman v. Taylor*,⁸ the United States Supreme Court set forth certain policy limitations on the scope of discovery when requested materials have been prepared by an attorney with an eye toward litigation. The Court noted that although the discovery rules should be given broad and liberal interpretation, the just resolution of disputes requires that courts restrain certain inquiries into an attorney's work product.⁹

The Court in *Hickman* outlined several policies underlying the work product doctrine. First, attorneys and parties should be encouraged to keep written records.¹⁰ If an attorney anticipates discovery requests, fear of the potential production of all written records concerning a particular

⁷FED. R. CIV. P. 26(b)(3). This rule provides in part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (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 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.

Id. See also IND. R. TR. P. 26(B)(3)(containing equivalent provisions).

⁸329 U.S. 495 (1947).

⁹*Id.* at 498-99.

¹⁰*Id.* at 511.

client's case may deter him from keeping proper written records.¹¹ Second, liberal discovery of an attorney's work would tend to diminish the attorney's efficiency, as he would begin to rely more upon his memory for the facts and ideas pertaining to his client's case.¹² Another reason for limiting discovery pertains to the demoralizing effect liberal discovery would have upon the legal profession.¹³ The Court noted that liberal discovery of an attorney's work might lead to "unfairness" and "sharp practices."¹⁴ These terms describe actions such as the attempt by the requesting party to take advantage of another's work or the preparation of misleading materials for production to the opposition upon a discovery request.¹⁵ The Court's final policy behind the work product doctrine was to ensure that the interests of clients and the cause of justice were adequately served.¹⁶ As stated by Justice Murphy, "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons"¹⁷

Federal Rule of Civil Procedure 26(b)(3), which was enacted in 1938, codifies the policies expressed in the *Hickman* decision.¹⁸ Notwithstanding the obvious importance of the policies and their codification, many courts continue to have difficulty in determining what materials were prepared in anticipation of trial and thus deserve limited immunity from discovery.¹⁹

Generally, courts have focused upon at least five different factors in determining whether or not requested materials fall within the limited immunity of federal rule 26(b)(3).²⁰ Some courts have examined the

¹¹*Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 (4th Cir. 1973); *Hercules Inc. v. Exxon Corp.* 434 F. Supp. 136, 151 (D. Del. 1977).

¹²329 U.S. at 511.

¹³*Id.*

¹⁴*Id.*

¹⁵For a more in-depth look at the potential for unethical conduct and related problems, see Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Levy, *Discovery—Use, and Abuse, Myth and Reality*, 17 FORUM 465 (1982).

¹⁶329 U.S. at 511.

¹⁷*Id.* at 512.

¹⁸See *Upjohn Co. v. United States*, 449 U.S. 382, 398 (1981). In *Upjohn*, the Court stated that "[t]he 'strong public policy' underlying the work product doctrine . . . has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)." *Id.* (footnote omitted).

¹⁹See Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 IOWA L. REV. 1277 (1981).

²⁰For example, one court required that there be "some possibility" of litigation. *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979). Others look to see if there was a "prospect" of litigation. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977). Still others suggest that there must be a "substantial probability" of imminent litigation. *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D. Ga. 1977).

nature of the event that prompted the preparation and the likelihood the event would lead to litigation.²¹ The more likely that a particular event would cause parties to litigate in order to protect their interests, the more likely that the materials were prepared or obtained for future litigation. Other courts have considered the timing of the preparation in relation to when specific claims arose or when discussion or negotiation began.²² Parties who became aware of specific claims and anticipated litigation would likely take action regarding litigation or negotiation soon after the materials were prepared or obtained. The substance of the materials is another factor used to determine the purpose for which the items were prepared or obtained.²³ Documents and statements which contain legal opinions are more likely to have been prepared for litigation than are materials composed of mainly factual information. Whether the materials were prepared or requested by an attorney is a fourth possible consideration.²⁴ Presumably, if an attorney became involved, it was due to the expectation of litigation. A fifth factor is whether the materials were prepared in the ordinary course of business or for some special purpose.²⁵ Courts which have emphasized this factor have traditionally found that routine materials would have been prepared regardless of whether or not litigation was anticipated.²⁶

The application of these factors and their underlying policies to each factual situation is a challenging task. Many courts have dealt with

²¹See *Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972); *Ritrovato v. Hartford Ins. Group*, 88 Misc. 2d 928, 390 N.Y.S.2d 504 (N.Y. Sup. Ct. 1976) (cases dealing with the particular nature of an accident). In *re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979), the court stated, " 'Thus the test should be whether, in light of the nature of the document and factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.' " *Id.* at 1229 (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 198 (1970)).

²²*Kent Corp. v. NLRB*, 530 F.2d 612, 623-24 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 335-36, 670 P.2d 725, 733-34 (1983)(en banc); *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d 84, 89 (R.I. 1978).

²³*In re Grand Jury Subpoena*, 599 F.2d 504, 510-11 (2d Cir. 1979) (holding that there was insufficient evidence to prove that an investigation by management was carried out by the corporation's general counsel); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980) (stating that the policy behind protection of the opinions and observations of an attorney is the need to uphold the integrity of the adversary process).

²⁴See *Sterling Drug Inc. v. Harris*, 488 F. Supp. 1019, 1026 (S.D.N.Y. 1980); *Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972).

²⁵*Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979); *Rakus v. Erie-Lackawanna R.R. Co.*, 76 F.R.D. 145, 146 (W.D.N.Y. 1977); *Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. 367, 373 (N.D. Ill. 1972); (Items prepared in the ordinary course of business are discoverable.).

²⁶*Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 423 (S.D.N.Y. 1981); *APL Corp. v. Aetna Casualty & Surety Co.*, 91 F.R.D. 10, 20 (D. Md. 1980); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 709 (S.D.N.Y. 1979); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972).

only one factor in their decisions. For example, some courts have considered only whether an attorney was involved in the preparation of documents.²⁷ Other courts have held that any documents prepared in the ordinary course of business are discoverable.²⁸

Although a determination based upon one factor may provide a quick solution in a particular case, such decisions are rather arbitrary and tend to overlook the policies behind the limited immunity from discovery. Insurance companies, for example, use a variety of complex procedures in each factual situation, and the application of a single factor test ignores the possible relevance of more than one factor.²⁹ By focusing upon separate factors, courts can easily reach inconsistent decisions in similar situations. For instance, assume that two insurance companies conduct investigations, without the participation of attorneys, into similar accidents. The documents compiled in each case are similar to those prepared by insurance companies every day. One court may note that no attorney requested or prepared the materials, concluding that the items are discoverable. Another court may examine the nature of the accident and the likelihood that litigation would result from it, finding that the work product doctrine protects the documents because litigation was very probable at the time they were prepared.³⁰ Such contrary results could be eliminated, or at least reconciled, if courts would expand their analyses to include other factors. Although one factor may be of greater significance in a given case, courts should consider each of the five factors when determining whether or not the requested materials were prepared in anticipation of litigation.

III. DEVELOPMENTS AND DOUBTS IN INSURANCE LITIGATION— INCLUDING A LOOK AT INDIANA LAW*

Recent trends in the area of bad faith actions have had a significant impact on the insurance business. An insurance company that denies a

²⁷*Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115 (N.D. Ga. 1972); *Henry Enter., Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979).

²⁸*McDougall v. Dunn*, 468 F.2d 468, 473 (4th Cir. 1972); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702 (S.D.N.Y. 1979).

²⁹*Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 335, 670 P.2d 725, 733 (1983)(en banc). See also Note, *supra* note 19, at 1286-87.

³⁰Such a situation may have occurred in *Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972) and *Thomas Organ Co. v. Jadranska Plobozna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972). *Thomas Organ* involved damaged cargo; *Almaguer* involved a personal injury claim following a train accident. Both sets of materials were prepared in the ordinary course of business. The *Thomas Organ* court held that the items were readily discoverable because no attorney was involved. 54 F.R.D. at 372. The *Almaguer* court, on the other hand, concluded that a railroad accident is the type of event that could reasonably lead a person to anticipate litigation. Therefore, the statement of a witness in *Almaguer* was protected by federal rule 26(b)(3). 55 F.R.D. at 149. The *Thomas Organ* court could have reached the same conclusion had it not insisted upon direct attorney involvement.

*On February 6, 1985, the Indiana Court of Appeals decided *Cigna-INA/Aetna v.*

claim may not only be forced to produce relevant files upon a discovery request; it may also have to pay greater damages if found liable for a bad faith breach of contract. The threat of high damage awards and uncertainty regarding discovery are relevant to an insurer's decision concerning a claim. In Indiana, for example, the insurer's decision is affected by a trend toward higher damages and the doubt regarding the proper application of the work product doctrine to insurance litigation.

A. Punitive Damages

One reason that insurance companies are concerned with the controversy over discovery involves the prevalence of claims for punitive damages in bad faith actions.³¹ An insurer that chooses to dispute a claim subjects itself to increased liability if the claimant is able to prove that the insurer's decision was carried out in bad faith. The majority of states recognize an insurer's right to question the facts surrounding a claim, or the application of law to a particular claim, before being forced to satisfy the claim; therefore, an insurer is generally liable for punitive damages only in cases involving extreme and outrageous circumstances.³² Currently, the type of conduct necessary and the standard of proof for recovering punitive damages vary from state to state.³³

Hagerman-Shambaugh, 473 N.E.2d 1033. An insured brought suit against its insurer following denial of coverage for damage to a construction project. The insured had requested production of "[a]ll memoranda, letters, notes or documents of any nature in possession of the defendant . . . as it relates to the claim . . . which is the subject matter of this lawsuit." The court did not share the insurance company's fear that liberal discovery would cause insurers to forego good faith investigations of claims; it further found that, based on the factual circumstances, the trial court had not abused its discretion in determining that the requested documents had not been prepared in anticipation of litigation and were therefore subject to discovery. *Id.* at 1036-39. This case will receive extensive treatment in the upcoming *Survey of Recent Developments in Indiana Law*, Volume 19, Issue 1, IND. L. REV. (1985).

³¹California led the way in the development of bad faith tort law, and became known for its high bad faith damages awards. For decisions permitting insureds to recover punitive damages against insurers, see *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (fire insurance); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) (disability insurance); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 58 Cal. Rptr. 13, 426 P.2d 173 (1967) (liability insurance).

³²*Thornton & Blaut, Bad Faith and Insurers: Compensatory and Punitive Damages*, 12 FORUM 699, 719 (1976-77). For additional discussions of bad faith recovery, see Note, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co.*, 25 HASTINGS L.J. 699 (1974); Note, *The Widening Scope of Insurer's Liability*, 63 KY. L.J. 145 (1975); Note, *The New Tort of Bad Faith Breach of Contract: Christian v. American Home Assurance Corp.*, 13 TULSA L.J. 605 (1978); Levine, *Demonstrating and Preserving The Deterrent Effect of Punitive Damages In Insurance Bad Faith Actions*, 13 U.S.F.L. REV. 613 (1979).

³³Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 879-81 (1976); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 642 (1980).

The Indiana Supreme Court confronted the trend toward increasing punitive damage claims in *Travelers Indemnity Co. v. Armstrong*.³⁴ *Armstrong* involved an insured's action to recover the full cost of repairing a building damaged by fire, as well as punitive damages for the insurance company's failure to pay the entire restoration cost.³⁵ The supreme court held that an insured must prove fraud, deceit, or oppressive conduct by clear and convincing evidence before an award of punitive damages would be justified.³⁶ Prior to *Armstrong*, the courts applied the preponderance standard, but strong social policy compelled the adoption of this strict standard.³⁷

The threat of punitive damages in bad faith actions is of concern to insurers regardless of whether a particular jurisdiction requires clear and convincing evidence, extreme or outrageous conduct, or both.³⁸ The contents of materials prepared during an insurer's consideration of a claim are relevant in determining whether or not bad faith exists and punitive damages are justified. The tort of bad faith occurs when an insurance company intentionally denies, fails to process, or refuses to pay a claim without a reasonable basis for its action.³⁹ Whether or not the conduct constitutes bad faith is a matter of reasonableness under the circumstances, so that the materials which embody the insurance company's decisionmaking process are relevant to the issue of bad faith.

The claimant who demonstrates the relevance of the materials to his ability to prove that an insurer acted in bad faith presents a strong basis for allowing discovery of the materials. Of special concern to the insurer is the possibility that a claimant in possession of the documents that indicate the grounds for the insurer's decision will be better able to make a case for punitive damages. Although cases such as *Armstrong* may slow the trend toward increasing punitive damage awards, a claimant has a strong case for acquiring the precise evidence needed to improve his chances of recovering punitive damages. Insurance companies, already uncertain as to how a court will determine whether or not materials were genuinely prepared in anticipation of litigation, may find their defenses weakening and their prospects for successful resistance of claims diminishing if liberal discovery is permitted.

³⁴442 N.E.2d 349 (Ind. 1982).

³⁵*Id.* at 352.

³⁶*Id.* at 363.

³⁷*Id.* at 362-63. Insurers might be forced into payment of questionable claims for fear that disputing any claim could lead to greater liability. Undeserving claims would be paid, resulting in higher insurance rates for all policy holders. See Thornton & Blaut, *supra* note 32, at 719. Recently, Indiana enacted legislation requiring clear and convincing evidence of all facts necessary to recover punitive damages in a civil action. IND. CODE § 34-4-34-2 (Supp. 1984).

³⁸California appears to have retreated from its previously high standard of care for insurers. California courts have taken the position that although there is proof that an insurer has violated its duty of good faith, the insured has the burden to prove the insurance company's conscious disregard of the rights of the insured, or its intention to vex, injure, or annoy him. *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 718, 521 P.2d 1103, 1110 (1974).

³⁹*Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 670 P.2d 725 (1983)(en banc).

B. *Newton v. Yates: A Decision Without a Solution*

The relationship among bad faith, punitive damages, and the rules of discovery adds greater confusion to an already uncertain Indiana position regarding the work product doctrine and insurance litigation. The only Indiana case in which such issues have arisen is *Newton v. Yates*.⁴⁰ *Newton* involved a personal injury action by the guest passenger of one automobile against the uninsured driver of the other vehicle involved in the accident.⁴¹ In the same proceeding, the plaintiff brought an action against the host driver's insurer for alleged misconduct in handling his claim.⁴² The trial court entered judgment for the tort defendants, and granted the insurer's motion for a separate trial on the misconduct claim.⁴³ In addition, the trial court granted limited immunity from discovery to a majority of the documents sought by the plaintiff.⁴⁴

Because the character of the issues, facts, and evidence regarding the negligence and punitive damages claims would differ and would likely lead to prejudice and confusion, the court of appeals found that the lower court acted properly within its discretion in granting separate trials.⁴⁵ The court considered the key guidelines by which a trial court must determine the applicability of Indiana Trial Rule 26(B)(3).⁴⁶ First, the requested documents must be relevant to the issues being tried.⁴⁷ The court of appeals did not make a determination on this element because the court record included neither the requested materials nor a clear indication of their relevance to the driver's negligence.⁴⁸ Instead,

⁴⁰170 Ind. App. 486, 353 N.E.2d 485 (1976).

⁴¹*Id.* at 489, 353 N.E.2d at 487.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.* at 491-92, 353 N.E.2d at 489. The requested documentary material included the following:

- (a) investigation materials;
- (b) recorded statements of all witnesses and parties;
- (c) damage estimates;
- (d) subrogation agreements;
- (e) correspondence between the insurer and the uninsured motorist (*Yates*);
- (f) contracts, agreements, and statements of the insurer that were signed by *Yates*;
- (g) records of payments made by *Yates* to the insurer;
- (h) correspondence between the insurer and the attorney for *Yates*;
- (i) reports of the insurer's agents;
- (j) correspondence between the insurer and the owner of a trailer located near the scene of the accident, as well as all investigation reports and photographs of the trailer.

Id.

⁴⁵*Id.* at 490, 353 N.E.2d at 488.

⁴⁶*Id.* at 493, 353 N.E.2d at 490.

⁴⁷*Id.*

⁴⁸*Id.*

the court examined the second guideline, whether or not the materials were protected from discovery by a privilege or immunity.⁴⁹

The court took the approach that work product immunity applies to attorneys, their agents, and the client, and concluded there was no evidence to indicate that the trial court had abused its discretion in determining that the items were not discoverable.⁵⁰ The court noted that the files might have been available if the trials had not been separated, but any error was harmless.⁵¹ Because the plaintiff failed to show substantial need or an inability to acquire the equivalent information elsewhere, only one item was discoverable.⁵² The *Newton* court deferred to the trial court's discretion, and the resulting opinion lends little assistance to parties in insurance litigation who seek to make or resist a request for discovery.

IV. APPROACHES TO THE "ANTICIPATION OF LITIGATION" ISSUES IN INSURANCE CASES

The two well recognized approaches to the discovery question in insurance litigation establish clear distinctions between materials that must be produced and those that are protected by the work product doctrine. Application of these approaches results in absolute decisions that require very little inquiry into whether or not the requested materials were truly prepared in anticipation of litigation. Neither approach gives full consideration to the policies behind federal rule 26(b)(3).

A. *The "Direction of Counsel" Approach*

According to one of the absolute approaches, some courts that have considered the materials prepared by an insurer merely have inquired as to who is responsible for the work.⁵³ Under this approach, if the investigation into a particular claim was not performed at the request or under the direction of an attorney, there is no need for further inquiry. The absence of counsel conclusively indicates that the investigation was routine and not carried out in anticipation of litigation.

Such an approach received its strongest support in *Thomas Organ Co. v. Jadranska Plobodna Plovidba*,⁵⁴ a decision that interpreted the 1970 amendments to the federal discovery rules. *Thomas Organ* involved an action to recover damages to cargo carried on the defendants'

⁴⁹*Id.*

⁵⁰*Id.* at 495, 353 N.E.2d at 491.

⁵¹*Id.*

⁵²*Id.* Only damage estimates were available.

⁵³*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).

⁵⁴54 F.R.D. 367 (N.D. Ill. 1972).

ship.⁵⁵ The defendants sought to prove that the plaintiff had failed to design and pack the shipped goods properly. The defendants further attempted to discover two documents written by a marine surveyor who was hired by the plaintiff's insurance company.⁵⁶ The court held the documents were not entitled to limited immunity from discovery, and interpreted the amended rule to mean that material that has "not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business."⁵⁷

In a more recent decision, the Supreme Court of Kansas followed the "direction of counsel" approach and stated that the majority of cases consider lack of attorney participation to be the deciding factor.⁵⁸ Although reliance upon this approach makes decisions much easier, courts have criticized such reasoning because the plain language of federal rule 26(b)(3) grants limited immunity to materials prepared " 'by or for another party or by or for that other party's representative.' "⁵⁹ Not only could the items have been prepared by a party, but there is no reason to conclude that his representative must have been an attorney. Other representatives may include consultants, sureties, indemnitors, insurers, or agents.⁶⁰ Certainly, attorneys are not the only ones who anticipate litigation and prepare for it.

In addition, adherence to such an absolute approach could lead insurance companies to involve attorneys at an earlier point in investigations. The insurer, on the other hand, may simply delay investigation until direct involvement of an attorney can be secured. Eventually, though, such regular programs might encourage courts to consider attorney participation at earlier stages to be a part of ordinary business, thus eliminating the significance of this factor. The delay of an investigation could also result in the loss of useful evidence and hinder the adequate and complete preparation of materials for trial, thus defeating the underlying goal of federal rule 26(b)(3).⁶¹ An overemphasis of the "direction of counsel" approach may result in inconsistent decisions, as previously noted.⁶²

Additional questions arise when in-house counsel or attorneys on retainer become involved. Of course, the communications between in-house counsel and a corporation are subject to the attorney-client privilege when an opposing party seeks discovery of relevant materials,⁶³ so it is likely that materials prepared by in-house counsel, as well as by

⁵⁵*Id.* at 368.

⁵⁶*Id.* at 368-69.

⁵⁷*Id.* at 372. Such materials are discoverable. *See supra* note 25 and accompanying text.

⁵⁸*Henry Enter., Inc. v. Smith*, 225 Kan. 615, 621, 592 P.2d 915, 920 (1979).

⁵⁹*Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 333, 670 P.2d 725, 731 (1983)(en banc)(quoting ARIZ. R. CIV. P. 26(b)(3)).

⁶⁰*See supra* note 7.

⁶¹*See Note, supra* note 19, at 1292.

⁶²*See supra* notes 29-30 and accompanying text.

⁶³*Malco Mfg. Co. v. Elco Corp.*, 45 F.R.D. 24 (D. Minn. 1968).

outside attorneys, are entitled to the limited immunity under the work product doctrine. Once again, however, a court might consider early involvement of in-house counsel to be only a sham and part of the insurer's ordinary course of business. The analysis could turn to an examination of the degree to which the attorney was involved, and whether or not the individual attorney anticipated litigation. Therefore, these types of attorney-client arrangements which can lead to routine attorney involvement demonstrate the unreliability and confusion that can result from strict adherence to the "direction of counsel" approach.

B. The "Total Coverage" Approach

A second view holds that all statements and information secured by an insurer after an event which may expose the insurer or its insured to a claim are prepared in anticipation of litigation.⁶⁴ *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*⁶⁵ led the way in granting limited immunity to all materials prepared by an insurance company in response to a potential claim. *Almaguer* involved an action by an injured party against his employer.⁶⁶ Shortly after the accident took place and two months before the claimant retained an attorney, the defendant's claims agent made a routine investigation and took the written statement of a witness.⁶⁷ The trial court granted the document limited immunity from discovery, relying upon cases cited in the Advisory Committee's Note to the 1970 revision of federal rule 26(b)(3), which concluded that statements acquired by a claims agent immediately after an accident are taken in anticipation of litigation.⁶⁸

More recently, the Rhode Island Supreme Court in *Fireman's Fund Insurance Co. v. McAlpine*⁶⁹ criticized the majority approach by stating that the "anticipation of litigation" requirement cannot be satisfied simply by the existence of an attorney who oversees the investigation.⁷⁰

⁶⁴*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).

⁶⁵55 F.R.D. 147 (D. Neb. 1972).

⁶⁶*Id.* at 148.

⁶⁷*Id.*

⁶⁸*Id.* at 149. The Advisory Committee's Note is located at 48 F.R.D. 497. For examples of cited cases, see *Guilford Nat'l Bank v. Southern Ry. Co.*, 297 F.2d 921 (4th Cir. 1962) (statements obtained by claims agents were not discoverable because both parties had equal access to the witness); *Hauger v. Chicago, Rock Island & Pac. R.R. Co.*, 216 F.2d 501 (7th Cir. 1954) (without showing good cause, an injured employee could not discover statements of witnesses obtained by one of the railroad companies in order to assist its attorneys in preparing a defense, although the decision was not based upon the work product doctrine); *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y. 1963) (involving accident reports prepared by employees prior to the initiation of any action, and not protected by the work product rule). In reality, the fact that the first two cases do not discuss the work product doctrine and the third case did not apply federal rule 26(b)(3) limited immunity to accident reports lends little, if any, support to the decision in *Almaguer*.

⁶⁹391 A.2d 84 (R.I. 1978).

⁷⁰*Id.* at 89.

The court likewise rejected a case-by-case approach for its inability to provide uniformity in lower court decisions.⁷¹ Instead, the court followed the *Almaguer* decision and held that because of the litigious nature of society, "when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party."⁷² This approach considers the "seeds of prospective litigation" to have been sown, resulting in an ever-present possibility of litigation, although early settlement of the insurance claim may preclude litigation.⁷³

The *Fireman's Fund* court was quick to point out, however, that under certain circumstances an insurer may conduct an investigation in the ordinary course of business, such as in a case where an accident report is required by law but is not necessarily prepared in response to a threat of litigation.⁷⁴ The "total coverage approach" would not apply because the report was prepared in order to fulfill a requirement of law rather than to serve as a help if litigation arose.

Logically, an insurance company that faces a potential claim recognizes the possibility that disagreements over the policy's coverage could lead to litigation. The materials prepared are potentially valuable evidence if the case goes to court, and the insurer naturally would want exclusive access to them. On the other hand, the relevance of documents and statements to potential litigation supports the idea that each party requires knowledge of the contents of the items in order to be prepared adequately and completely for litigation. Courts thus face two conflicting policies in dealing with discovery requests in insurance litigation, policies which demonstrate the inability of absolute approaches such as the "direction of counsel" or "total coverage" views, to provide fair results to both parties.

V. PROTECTION OF INSURERS AND CLAIMANTS

In *Upjohn Co. v. United States*,⁷⁵ the United States Supreme Court devoted a portion of its discussion to the work product doctrine and the policies behind it. The Court noted that a key reason for protecting certain materials is the need to encourage parties to develop all of the facts and compile a thorough record of each case.⁷⁶ Protection of these records allows a party to carry out his quest for information without fear of having his written materials revealed to an opponent.

The foregoing policy is certainly applicable to insurance litigation. In order to provide deserving claimants with fair protection under their

⁷¹*Id.* (citing *Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975)).

⁷²391 A.2d at 89-90.

⁷³*Id.* at 90.

⁷⁴*Id.* (citing *Nordeide v. Pennsylvania R.R. Co.*, 73 N.J. Super. 74, 179 A.2d 71 (1962)).

⁷⁵449 U.S. 383 (1981).

⁷⁶*Id.* at 398.

insurance policies and to avoid payment of illegitimate claims, insurers should be encouraged to conduct complete investigations into possible claims and maintain accurate files of surrounding facts and conclusions. In the *Hickman* case, for example, the Court warned that allowing one party free access to any relevant information possessed by the other would undermine such a policy.⁷⁷ If claimants are readily allowed to discover files kept by insurers, the insurers might decide to limit the preparation of documents regarding a particular claim. A request for discovery of such limited files would not likely produce beneficial information for a claimant, and society as a whole would suffer from the incomplete services that insurance companies would provide.

On the other hand, insurance companies are powerful litigators with the ability to acquire a great deal of information. To provide them with complete protection would place insureds at a substantial disadvantage, particularly those who decided to leave the work to the insurance company under the assumption that the claim would be processed without the need for litigation.⁷⁸ Additionally, claimants forced to conduct their own investigations would face increased expenses when bringing actions against insurers.⁷⁹

The application of absolute approaches overlooks the need to balance the conflicting policies involved in insurance litigation. Under the "direction of counsel" approach, an insurance company must turn over its file unless an attorney participated in the work, thus ignoring the adverse effect liberal discovery can have upon an insurer's work. The "total coverage" approach protects the insurer, but puts the claimant at a disadvantage, one that could lead deserving claimants to abandon legal action. The policy of encouraging complete and adequate preparation demands a balanced approach that provides each party with the privacy and opportunity necessary for fair adjudication.⁸⁰

VI. COMPARING THE FACTS WITH THE FACTORS— A SUGGESTED APPROACH

To avoid arbitrary outcomes which may result from the application of only one factor, the better approach is to examine the facts of each case and their relationship to each one of the five factors used to determine whether or not requested materials were prepared in anticipation of litigation. Because business and claim procedures are complex and greatly varied, no test which employs a single factor will provide an adequate framework for consistent decisions in harmony with the

⁷⁷329 U.S. at 511.

⁷⁸See *Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. at 373; *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972).

⁷⁹*Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982).

⁸⁰See Note, *supra* note 19, at 1299.

policies which support the work product doctrine.⁸¹ There will likely be situations in which one or more of the factors will not be as determinative or even as relevant as the others. Nonetheless, consideration of the applicability of each factor is more likely to reveal whether, under the facts surrounding the claim, the person who prepared the items did so with an eye toward litigation.

A. *The Nature of the Event Producing the Claim*

Admittedly, nearly all circumstances and events which may produce a claim potentially result in litigation.⁸² The mere fact that a claim is likely, however, does not mean that the event and its ramifications are likely to be so problematic as to lead to a genuine threat of legal action.⁸³

The decision in *Ritrovato v. Hartford Insurance Group*⁸⁴ demonstrates how the unique circumstances of an incident can indicate that an insurer immediately began to gather information and prepare documents in anticipation of litigation. In *Ritrovato*, the court focused upon the high level of suspicion regarding the source of a fire that resulted in a claim under a fire insurance policy.⁸⁵ The day after the fire, a claims representative of the insurer visited the site of the loss, only to find that the police had sealed off the premises.⁸⁶ Upon stopping at the police station, an investigator assigned to the case informed the claims representative that the police considered the fire to be of incendiary origin.⁸⁷ The claims agent also saw evidence which supported the suspicion.⁸⁸ The court agreed that the evidence was strong enough to lead the insurer to conduct the rest of the investigation in preparation of a defense against the claim and protected the files from disclosure.⁸⁹

The key element in *Ritrovato* was the nonroutine nature of the investigation due to the suspicion surrounding the fire. This consideration is closely tied to another factor: whether or not the investigation was conducted in the ordinary course of business.⁹⁰ The *Ritrovato* court did not discuss particular aspects of the investigation that made it abnormal, but clearly found that unusual circumstances surrounding an event could immediately trigger a response from an insurer which indicates that litigation was expected.

⁸¹*Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 335, 670 P.2d 725, 733 (1983) (en banc).

⁸²See *Almaguer v. Chicago, Rock Island & Pac. R.R. Co.*, 55 F.R.D. at 149; *Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d at 89-90.

⁸³*Spaulding v. Denton*, 68 F.R.D. 342 (D. Del. 1975); *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688 (S.D.N.Y. 1974).

⁸⁴88 Misc. 2d 928, 890 N.Y.S.2d 504 (N.Y. Sup. Ct. 1976).

⁸⁵*Id.*

⁸⁶*Id.* at 929, 390 N.Y.S.2d at 504.

⁸⁷*Id.*

⁸⁸*Id.*, 390 N.Y.S.2d at 504-05.

⁸⁹*Id.*, 390 N.Y.S.2d at 505. In *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982), the court specifically stated that fire loss claims are more likely to lead an insurer to suspect fraudulent or criminal conduct than are other types of property loss claims. *Id.* at 135.

⁹⁰See *infra* notes 146-57 and accompanying text.

Another consideration is the degree of suspicion or resolve on the part of the insurer that is necessary to indicate that the insurer had good reason to conduct its investigation with the intention of ultimately resisting a claim. A problem also surfaces when, after an extensive investigation involving the preparation of a large quantity of documents, the insurer realizes that the nature of the event requires denial of coverage under the appropriate policy.⁹¹

A set standard for analysis of the likely response from an event with unusual circumstances is probably undesirable, as is a set standard for determining the entire "anticipation of litigation" issue. Some cases which support the suggested approach rely upon an indication that litigation became "probable."⁹² Once again, however, the necessary degree of probability is subject to the trial court's discretion, an element that is discomfoting to some courts.⁹³

Trial court discretion in determining whether and to what extent the special nature of an event would influence an insurer to be suspicious and to conduct its investigation with the intent to defend itself against a claim is not inconsistent with provisions authorizing trial court discretion in other areas.⁹⁴ This allowance is especially appropriate in light of the fact that the "nature of the event" factor is only one of five to be used in the total analysis. The disadvantage of allowing discretion is far outweighed by the fair outcome that will result from a consideration of all five factors and their relationship to the facts of each case.

B. *The Time of Preparation*

Another factor which deserves consideration is the relationship between the time when the insurer became aware of specific claims and the time when the requested materials were prepared.⁹⁵ The existence of specific claims presumably would lead a party to prepare materials for

⁹¹Naturally, the solution depends upon the relation of the other four factors to the case, although it appears that if a decision to resist the claim occurred after much investigation, the "nature of the event" factor would be of less significance because the insurer did not anticipate litigation during the preparation of the materials.

⁹²See *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982) (noting that at some point the probability of litigation becomes "substantial and imminent"). In *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 670 P.2d 725 (1983)(en banc), the court found that litigation was "quite probable." *Id.* at 336, 670 P.2d at 734.

⁹³*Fireman's Fund Ins. Co. v. McAlpine*, 391 A.2d at 89.

⁹⁴See generally Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 760-61 (1982); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975). In particular, judges exercise broad discretion in pre-trial, trial, and post-trial matters, including decisions regarding extensions of time, amendment of pleadings, selection of jurors, attorney statements, admission of certain kinds of evidence, and granting of new trials. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 657-58 (1971).

⁹⁵*McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 92 (E.D. Mo. 1980); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977).

negotiations or litigation which would soon follow. In *Fontaine v. Sunflower Beef Carrier, Inc.*,⁹⁶ the plaintiff brought an action for injuries suffered in an automobile accident which allegedly resulted from the negligence of the defendant's driver. On the day of the accident or shortly thereafter, the driver made statements to the defendant's safety director, insurer, and investigator.⁹⁷ The plaintiff sought to discover copies of the statements. The court considered the cases involving discovery of materials prepared by insurers as being part of a spectrum.⁹⁸ At one end was the "direction of counsel" approach; at the other end was the "total coverage" view.⁹⁹ Because the requirement of attorney participation was not in keeping with the language of federal rule 26(b)(3), the court refused to limit the protection to documents prepared only by a party's representative.¹⁰⁰ Similarly, the court expressed concern over the protection of documents prepared by an insurer when litigation was only a possibility.¹⁰¹

The *Fontaine* court reasoned that the soundest approach, and the one which best accommodated the "competing considerations involved," was to examine whether or not specific claims were present at the time the documents were prepared.¹⁰² Under the facts of the *Fontaine* case, the court found that the existence of specific claims in connection with the accident indicated litigation was "clearly identifiable," regardless of the fact that no suit had been filed.¹⁰³ The identification of the likely plaintiff and the potential claims to be asserted were sufficient to meet the court's requirements.¹⁰⁴

The insurer's perception of potential claims at the time when the materials were prepared supports the notion that the items could have been intended for use in subsequent litigation. The intent is even more clear when the nature of the claim automatically leads the insurer to suspect that the applicable policy does not cover the claim. Nonetheless, the preparation of documents long before a suit is filed is strong evidence that litigation was not anticipated.¹⁰⁵

⁹⁶87 F.R.D. 89 (E.D. Mo. 1980).

⁹⁷*Id.* at 91.

⁹⁸*Id.* at 92.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* The court referred to *Miles v. Bell Helicopter*, 395 F. Supp. 1029 (N.D. Ga. 1974), in which concern was expressed regarding the difficulty of differentiating between an investigation conducted in anticipation of litigation and one conducted for other reasons. At the same time, however, the *Fontaine* court refused to follow the *Miles* position that there must be a substantial probability of imminent commencement of litigation.

¹⁰²87 F.R.D. at 92.

¹⁰³*Id.* at 93.

¹⁰⁴*Id.*

¹⁰⁵*See* *McDougall v. Dunn*, 468 F.2d 473 (4th Cir. 1972). The *McDougall* court noted that the time between the preparation and the filing of suit was two and one half years. Also, the court considered an additional factor, the lack of an attorney's involvement. A claims adjuster prepared the statements. *Id.*

As with each factor, total reliance upon the existence or obviousness of specific claims at the time the materials were prepared can produce unfair conclusions. For instance, if an insurer must have only a good idea of the identity and claims of a potential claimant, insurers would take steps to identify likely claimants and probable claims quickly in an effort to protect investigation files from discovery.¹⁰⁶ In addition, an insurer might postpone the preparation of documents until specific claims are known, which could result in the loss of important facts, as well as in inadequate investigations. Claimants would be placed at a severe disadvantage. The insurer's knowledge of the identity of the claimant and the nature of the claim certainly does not necessarily indicate that the insurer plans to oppose the claimant and face litigation.

The requirement of the existence of specific claims and an identifiable plaintiff could result in injustice to an insurer who investigates an occurrence or the activities of its insured when the insurer expects to find evidence of a violation that would remove the event or disqualify an insured from insurance coverage. Certainly, an insurer could plan to use the information to defend itself in the future. An unexpected claimant could later appear with a different theory for recovery, or the insured could file a claim for something not necessarily considered during the investigation. If an insurer does not know of the specific claims or of a probable claimant, the materials prepared during the investigation would be discoverable, leaving an insurer's defense plan open to opposing parties.¹⁰⁷ Even the Supreme Court appears to recognize that specific claims do not have to exist during the preparation of materials in order for work product immunity to apply.¹⁰⁸

Although the amount of time between the preparation of documents and the existence of specific claims cannot conclusively indicate an anticipation of litigation, this factor deserves consideration. This factor is particularly significant when an insurer immediately becomes aware that a particular claim or claimant is not likely covered by an insurance agreement, resulting in an investigation intended to prepare the insurer's defenses.

C. *The Existence of Legal Opinions*

Discovery rules applicable in federal and Indiana courts provide additional immunity to statements and materials containing "mental impressions, conclusions, opinions, or legal theories of an attorney or

¹⁰⁶Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. at 93.

¹⁰⁷*Id.*

¹⁰⁸In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), corporate documents compiled during an internal investigation into allegedly illegal activities were not discoverable when the government later initiated tax summons enforcement proceedings. Although the investigation took place prior to the time specific claims arose, or the time when the Internal Revenue Service became aware of the activities, the court held that work product immunity applied. *Id.* at 398-99.

other representative of a party concerning the litigation."¹⁰⁹ This immunity precludes discovery even if the requesting party has shown substantial need and an inability to obtain similar information without undue hardship. There is a dispute, however, as to the extent of such immunity. Some courts consider the immunity to be an absolute one.¹¹⁰ Total immunity would pose a significant obstacle to a party attempting to proceed against an insurer.¹¹¹ As previously noted, an action against an insurance company for a bad faith breach of contract necessitates the claimant's acquisition of evidence regarding the denial of his claim.¹¹² Therefore, when mental impressions, opinions, or conclusions are directly at issue in a case, courts often permit an exception to strict protection.¹¹³

Not all courts permit discovery in bad faith actions, even though the plaintiff alleges that the mental impressions of an insurer's agents and employees are the subject matter of the lawsuit.¹¹⁴ In *North Georgia Lumber & Hardware v. Home Insurance Co.*,¹¹⁵ an insured sued an insurer for failure to pay for a property loss allegedly covered by a fire insurance contract. The court held that the issue of bad faith would be resolved at trial, based upon the strength or weakness of the insurer's defense.¹¹⁶ The mental impressions of the insurer's agents during or after the investigation was not the test by which the bad faith of the insurer was analyzed.¹¹⁷ In addition, the court found that the amount of information compiled by the insurer did not increase or decrease the risk taken by the defendant in its refusal to pay the claim.¹¹⁸ The *North Georgia* court held that a good faith defense required a reasonable and probable cause for making the decision, and that such a defense was a complete defense to the action.¹¹⁹ Therefore, the plaintiff could not

¹⁰⁹FED. R. CIV. P. 26(b)(3). See *supra* note 7. The composition of a protected mental impression is not clearly defined. Particular categories of opinion work product include strategies, intended lines of proof, evaluations of the strengths and weaknesses of a case or defense, and inferences drawn from available facts. See Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969); Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333 (1978).

¹¹⁰*Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 n.3 (S.D. Ga. 1976).

¹¹¹See *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134-35 (S.D. Ga. 1982); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 336, 670 P.2d 725, 734 (1983)(en banc).

¹¹²See *supra* notes 38-39 and accompanying text.

¹¹³*Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975); *Bird v. Penn Cent. Co.*, 61 F.R.D. 43 (E.D. Pa. 1973).

¹¹⁴*North Georgia Lumber & Hardware v. Home Ins. Co.*, 82 F.R.D. 678 (N.D. Ga. 1979).

¹¹⁵82 F.R.D. 678 (N.D. Ga. 1979).

¹¹⁶*Id.*

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹*Id.*

successfully argue that the opinions of the agents were the subject matter of a bad faith lawsuit.¹²⁰

Some courts have permitted a party in insurance litigation to delete all portions of documents which contain opinions before producing the remainder to the requesting party.¹²¹ Such a result would appear to provide fairness to both parties: the claimant receives a substantial portion of the relevant information, and the insurance company is able to protect its ideas and strategy for use in litigation. At the same time, however, there may be no reason to withhold the entire document. As one court reasoned, “[I]n focusing on the question of whether documents containing mental impressions are discoverable, the parties have begged the more dispositive question in this dispute.”¹²² In *Carver v. Allstate Insurance Co.*,¹²³ the court noted that the real issue is whether or not the materials were prepared in anticipation of litigation. Another approach to the issue is to determine whether the opinions were recorded with a belief that such opinions would serve as a basis for defenses against a claim.

Indeed, a statement in which a claims investigator or an attorney indicated his belief that a claimant was not entitled to recovery would constitute strong proof that, at least from that point forward, the investigation was conducted with an eye toward preparing a defense.¹²⁴ Of course, a similar statement to the effect that a valid claim existed could indicate that a routine investigation was still taking place. If two or more opinions conflicted, it would be difficult to reach any conclusion regarding the direction of an investigation at the time, unless, of course, one opinion deserved much greater weight.¹²⁵ For this reason, a court should consider all five factors rather than focusing only on the absence or existence of mental impressions and like factors.

Claims agents, as well as attorneys, often prepare reports or memoranda that reflect their mental impressions or personal evaluations of a factual situation, especially when litigation is expected.¹²⁶ Yet, the fact that a document contains a person's opinions does not necessarily preclude an opposing party's right to obtain the information relevant to his case. Absolute protection of such documents could lead insurers to saturate all materials compiled during an investigation with even the most insignificant opinions in order to prevent potential claimants from preparing adequate cases. Nonetheless, if an insurer expects litigation and seeks to prepare defenses against a claim, the insurer should be entitled to

¹²⁰*Id.*

¹²¹*Southern Ry. Co. v. Lanham*, 403 F.2d 119, 133 (5th Cir. 1968); *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 102 (N.D. Ga. 1977).

¹²²*Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 133-34 (S.D. Ga. 1982).

¹²³94 F.R.D. 131 (S.D. Ga. 1982).

¹²⁴*Id.* at 134. *See also Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979).

¹²⁵For instance, an attorney's opinion regarding a questionable claim could be a strong influence upon an insurer's decision to begin building a defense file.

¹²⁶*Southern Ry. Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968).

keep legal theories and strategies from an opposing party. Without such protection, a claims adjuster or other representative might refuse to report all of his thoughts and ideas concerning a claim. The nonexistence of reliable records might disrupt an insurance company's evaluation process and result in unreliable evaluation and disposition of claims.¹²⁷

The existence of opinions and mental impressions in the requested materials should lead courts to examine how the facts and the course of the investigation relate to the legal analyses expressed. The content of the documents, in conjunction with the other four factors, will give some indication as to the direction of the insurer at the time the items were prepared.

D. Attorney Involvement

Although an overemphasis upon the preparer of the requested documents can arbitrarily shift the focus away from the underlying question in insurance litigation,¹²⁸ an examination of who requested or prepared the materials may reveal the purpose of the work. As previously stated, federal rule 26(b)(3) provides work product immunity to items prepared by a party or its representative.¹²⁹ No direct attorney involvement is necessary. If attorney involvement were required, the rule could simply state that materials prepared or requested by an attorney are protected. Instead, the rule requires an additional aspect: that the party or representative must have prepared or requested the items in anticipation of litigation. Courts, however, do consider a client's relationship with his attorney to be significant in relation to discovery requests. For instance, the attorney-client privilege provides protection to communications between a client and his lawyer.¹³⁰ The protection is supported by the policy that legal communications should be encouraged.¹³¹ Complete protection, however, can also result in hardship to a party if it is necessary to have the information for the administration of justice, in which case courts may not apply the privilege.¹³² It is a matter of balancing competing policies. Although such a privilege is often claimed in cases involving the discovery of documents, courts are quick to point out that the attorney-client privilege is separate from the work product doctrine.¹³³

¹²⁷Carver v. Allstate Ins. Co., 94 F.R.D. at 134.

¹²⁸See *supra* notes 53-63 and accompanying text.

¹²⁹See *supra* note 7.

¹³⁰Prichard v. United States, 181 F.2d 326 (6th Cir. 1950), *aff'd mem.*, 339 U.S. 974 (1950). See also Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977); Note, *Attorney-Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685 (1976).

¹³¹Wisconsin Lime & Cement Co. v. Hultman, 306 Ill. App. 347, 28 N.E.2d 801 (1940).

¹³²Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942).

¹³³Hickman v. Taylor, 329 U.S. 495 (1947); Daniels v. Hadley Memorial Hosp., 68 F.R.D. 583 (D.D.C. 1975); Halford v. Yandell, 558 S.W.2d 400 (Mo. Ct. App. 1977).

The involvement of an attorney and the subsequent effect upon insurance litigation also requires a balancing of two policies.¹³⁴ An attorney's work should be protected to encourage him to prepare his case completely and adequately. On the other hand, a claimant should also be given the opportunity to prepare his case adequately.

Courts that have rejected the majority view that attorney involvement is necessary for application of work product immunity have, nonetheless, considered the existence or absence of attorney input to be a relevant factor.¹³⁵ There are several reasons to give weight to an attorney's participation, or lack thereof, in preparing the documents sought by a claimant. First, special consideration should be given to an attorney's work to encourage a complete analysis of a particular claim. Second, the inclusion of an attorney's input into an investigation signals the likelihood of legal opinions and the possible presence of legal strategy. Third, when an insurance company retains counsel to handle a particular investigation or claim, there is good reason to suspect that the insurer has a special purpose for its decision.

The analysis is ultimately determined by the basic question of why the attorney requested or prepared the materials. Certainly, an attorney may become involved in an investigation with the intention that he will oversee and conduct the routine investigation, not expecting to uncover information that will eventually lead to litigation. Moreover, an attorney may merely become involved in an effort to evaluate the legitimacy of a claim. Such situations do not provide good grounds for the conclusion that the attorney's work was done in anticipation of litigation.¹³⁶

At a certain point, however, an attorney's role becomes more indicative of an intention to prepare a defense against a claim.¹³⁷ In *Carver v. Allstate Insurance Co.*,¹³⁸ for example, an insured sought to recover insurance proceeds and statutory penalties for the insurer's alleged bad faith refusal to pay a loss. The court examined the involvement of attorneys at various stages in the investigation, and referred to the "direction of counsel" approach.¹³⁹ The early stages of the investigation were routine in that the management was primarily concerned with the decision of whether or not to pay the claim.¹⁴⁰ Following the preparation of standard reports, however, the activity shifted from mere claims

¹³⁴See *supra* notes 10-17 and accompanying text.

¹³⁵*Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y. 1981); *Spaulding v. Denton*, 68 F.R.D. 342, 345 (D. Del. 1975); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 336, 670 P.2d 725, 734 (1983)(en banc).

¹³⁶See *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420 (S.D.N.Y. 1981); *APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10 (D. Md. 1980) (cases involving attorney participation which did not exclude the materials from discovery).

¹³⁷*Carver v. Allstate Ins. Co.*, 94 F.R.D. at 134-35; *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 336, 670 P.2d 725, 734 (1983)(en banc).

¹³⁸94 F.R.D. 131 (S.D. Ga. 1982).

¹³⁹*Id.* at 135.

¹⁴⁰*Id.* at 134-35.

evaluation to a plan under which litigation became much more likely.¹⁴¹ Because the claimed monetary loss was substantial and the cause of the loss was suspicious, a senior claims representative became involved.¹⁴² During his investigation, the senior representative sent various reports to Allstate's claims attorneys, a fact upon which the court relied to find that corporate counsel had closely monitored the activity.¹⁴³ Finally, the file was turned over to an Allstate defense attorney.¹⁴⁴

The involvement of attorneys at various stages in the investigation significantly indicated a shift in the course of the investigation. The *Carver* case is uniquely significant for its consideration of four of the relevant factors, and especially for its demonstration that a non-attorney can produce investigative reports that fall within the qualified protection of the work product doctrine.¹⁴⁵

Carver is also a good example of a court's examination of the reason for the attorneys' involvement. An insurer's decision to retain counsel, especially lawyers designated as defense attorneys, should signal to a court that the investigation had taken a course likely to lead to litigation. Of course, as the *Carver* decision revealed, the other factors are necessary to determine the reason for the attorney's involvement and the purpose behind the materials he requested or prepared.

E. Whether Preparation Was Routine or for a Special Purpose

The last factor requires an examination of the relationship between the preparation of the materials and the insurance company's ordinary course of business. This factor is especially applicable to insurance companies, which naturally operate under an aura of anticipation of litigation.¹⁴⁶ For example, the nature of the insurance business requires that an insurer investigate a claim before determining the appropriate response.¹⁴⁷ Such an investigation is routine, and the materials compiled during the early stages of the investigation are generally discoverable unless the insurer is able to show the participation of an attorney or some other factor which would invoke work product immunity.¹⁴⁸ Never-

¹⁴¹*Id.*

¹⁴²*Id.* at 135.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵The court considered the suspicious nature of the fire, the routine nature of the early stages of the investigation, the involvement of counsel, and the existence of opinions and mental impressions.

¹⁴⁶*APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10, 17 (D. Md. 1980); *Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708-09 (S.D.N.Y. 1979); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115, 118 (N.D. Ga. 1972).

¹⁴⁷*Thomas Organ Co. v. Jadranska Plobodna Plovidba*, 54 F.R.D. 367 (N.D. Ill. 1972).

¹⁴⁸*See Carver v. Allstate Ins. Co.*, 94 F.R.D. at 134; *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y. 1981); *Henry Enter., Inc. v. Smith*, 225 Kan. 615, 621-22, 592 P.2d 915, 920-21 (1979).

theless, an insurance company's routine investigation of claims does not negate the insurer's genuine anticipation of litigation at an early point in the case. The existence of other factors can indicate that the investigation was not routine from the very beginning.¹⁴⁹ The policy favoring complete and adequate preparation of cases contrasts with an insurance company's claim that it should not be forced to turn over materials prepared by its agents or other employees because insurers always anticipate litigation to some extent. It is interesting to note, however, that some courts refuse to designate an insurer's investigation files as ordinary preparation that is outside the protection of the work product doctrine.¹⁵⁰

In *Almaguer v. Chicago, Rock Island & Pacific Railroad Co.*,¹⁵¹ the court held that the statement taken by a claims agent following a railroad accident in which an employee was injured was taken in anticipation of litigation. The court found the investigation was routine, but that it was a "reasonable assumption" that legal action would ensue.¹⁵² A contrary decision was reached in *Spaulding v. Denton*,¹⁵³ a case involving a yacht accident that was followed by an investigation by a marine surveyor hired by the insurer in an effort to gather all of the available information. The *Spaulding* court found that the reports, which were unusual in the sense that the insurer did not normally order an outside investigation, were materials prepared in the ordinary course of business and were discoverable.¹⁵⁴ Both cases involved somewhat unusual accidents and routine inquiries, but the courts reached different conclusions.

Such inconsistent results can be avoided only by examining the nature of the investigation and the purpose behind it. The fact that insurers ordinarily investigate accidents and potential claims does not eliminate the possibility that an insurer expected the investigation to result in the denial of a claim and subsequent legal action.

There are several items courts should consider when analyzing this factor. Certain reports prepared during an investigation are standard, and would have been prepared whether litigation was anticipated or not. Usually, the only purpose of the report is to assist the insurer in its decision whether or not to resist the claim.¹⁵⁵ Another signal to which

¹⁴⁹*Ritrovato v. Hartford Ins. Group*, 88 Misc. 2d 928, 929, 390 N.Y.S.2d 504, 505 (N.Y. Sup. Ct. 1976). For a discussion of this case, see *supra* notes 83-88 and accompanying text.

¹⁵⁰*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, 89-90 (R.I. 1978); *Ainsworth v. Union Free School Dist. No. 2, Queensbury*, 38 A.D.2d 770, 771, 327 N.Y.S.2d 873, 875 (1972).

¹⁵¹55 F.R.D. 147 (D. Neb. 1972).

¹⁵²*Id.* at 149.

¹⁵³68 F.R.D. 342 (D. Del. 1975).

¹⁵⁴*Id.* at 346.

¹⁵⁵See generally *Carver v. Allstate Ins. Co.*, 94 F.R.D. at 134-35; *APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10, 20 (D. Md. 1980). In *APL Corp.*, the court referred to a description of the insurance company's routine investigation procedures given in a deposition. Naturally, any court should be well informed as to how the insurer normally investigates an accident or claim and what purpose is served at each stage. *Id.*

courts should be alerted is a significant change from the pattern of routine operations. For instance, once initial reports are examined, the insurer may provide new instructions.¹⁵⁶ The investigation could become more intense, or particular inquiries may reveal suspicions on the part of the insurer. Of course, outright denial of a claim is the indicator to some courts that an insurance company's course of business is shifting from routine activities to an anticipation of litigation.¹⁵⁷

In addition, the unusual nature of the event, the existence of specific claims or legal opinions, and attorney participation can indicate that an investigation was a departure from the usual procedures. All five factors are interdependent and should be considered when searching for the purpose behind materials prepared by an insurer.

VII. CONCLUSION

Because insurance companies are engaged in the business of anticipating litigation, the application of discovery rules requires a close examination of the circumstances surrounding the preparation of requested documents. Analysis of the "anticipation of litigation" issue with regard to only one of the relevant factors results in inconsistent decisions. Courts should consider all five factors and their relation to the complex and varied business and claims procedures of insurance companies before concluding that certain items were or were not prepared with a sufficient expectation of legal action. In some situations, a particular factor may be inapplicable or of less significance, but application of all relevant factors will result in decisions consistent with the policies behind the work product doctrine.

This Note has revealed the inadequacies of reliance upon a single factor, as well as the problems which currently face insurers and claimants when the issue of discovery arises. Courts should address the following five issues in their analysis of whether or not materials were prepared in anticipation of litigation: (1) whether or not the nature of the event was such that insurers and claimants would be inclined to expect litigation; (2) whether or not specific claims existed at the time the items were prepared, and in what manner they influenced the investigation; (3) whether or not the materials contained legal opinions that were relevant to the action or were of such a nature that they deserved protection; (4) whether or not an attorney requested or prepared the materials, and the nature of his role; and, (5) whether the materials were prepared in

¹⁵⁶*Spaulding v. Denton*, 68 F.R.D. at 346.

¹⁵⁷*Carver v. Allstate Ins. Co.*, 94 F.R.D. at 134-35; *APL Corp. v. Aetna Casualty & Sur. Co.*, 91 F.R.D. 10, 18 (D. Md. 1980); *Brown v. Superior Court In & For Maricopa County*, 137 Ariz. 327, 336, 670 P.2d 725, 733-34 (1983)(en banc). *But see Westhemeco Ltd. v. New Hampshire Ins. Co.*, 82 F.R.D. 702, 708 (S.D.N.Y. 1979) (insurer notified the plaintiff that it was denying liability for the claim, but further negotiations and cooperation between the parties indicated that the investigation continued to be conducted in a routine way).

the usual course of the insurer's business or whether they indicated that litigation was expected.

The foregoing factors are closely related, and all should be considered in light of the work product doctrine and the policy of encouraging adequate and complete preparation for trial. Only through the application of all such considerations can insurers and claimants expect fair and consistent decisions.

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