UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BROADROCK GAS SERVICES, LLC, and RHODE ISLAND LFG GENCO, LLC,

Plaintiffs,

-against-

AIG SPECIALTY INSURANCE COMPANY f/k/a Chartis Specialty Insurance Company,

Defendant.

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MEMORANDUM & ORDER

14 cv. 3927 (AJN) (MHD)

3/2/15

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE:

Plaintiffs commenced this coverage lawsuit against AIG Specialty Insurance Company ("ASIC") to challenge defendant's declination of coverage for two separate claims under a pollution liability policy. Plaintiffs further allege bad faith in defendant's refusal to provide such coverage, based, at least in part, on the carrier's coverage for another entity, Rhode Island Resource Recovery Corporation ("RIRRC"), which was named on the policy as an additional insured. The coverage dispute was triggered by a lawsuit against both insureds by the Town of Johnston, Rhode Island, which asserted a claim of public nuisance against them. At the time, RIRRC was the owner and operator of Rhode Island's Central Landfill and plaintiff Broadrock Gas Services LLC

("Broadrock") was the owner and operator of the landfill gas collection system at Central Landfill.

The parties are now in dispute as to the discoverability of three sets of documents that plaintiffs have sought from defendant. (See docket nos. 30-34). Having objected to some of plaintiffs' requests on various grounds, ASIC has moved for a protective order to preclude production of (1) a memorandum prepared by its coverage counsel, the law firm Litchfield Cavo, (2) a "memorandum to file" prepared by the law firm K&L Gates, acting as counsel for RIRRC, and sent by Gates to the carrier's coverage counsel, the law firm Zelle, McDonough & Cohen, LLP, and (3) draft versions of, and metadata from, four coverage letters that were sent in final form from ASIC to Broadrock. In response, plaintiffs still pursue production of the K&L Gates memorandum and the draft version and metadata of at least one of the four originally listed coverage letters sent to Broadrock during the period from July 6 to November 13, 2012. Moreover, they also ask for disclosure of certain segments deleted from various so-called executive claim summaries previously produced by ASIC in redacted form.

ANALYSIS

We address each item in turn. Before doing so, we note certain basic principles. As the Second Circuit has repeatedly noted, "the burden is on a party claiming the protection of a privilege to establish those facts that are essential elements of the privileged relationship." von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). See, e.g., United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011); In re Grand Jury Subpoena Dated July 6, 2005, 256 F. App'x 379, 382 (2d Cir. 2007); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 470 (S.D.N.Y. 1993) (citing cases). Thus the proponent of the privilege "must establish all elements of the privilege." Id. (citing inter alia In re Horowitz, 482 F.2d 72, 82 (2d Cir. 1973); People v. Mitchell, 58 N.Y.2d 358, 373, 461 N.Y.S.2d 267, 270 (1983)). Accord BNP Paribas v. Bank of New York Trust Co., N.A., 2013 WL 2434686, *2 (S.D.N.Y. June 5, 2013). That showing must be made by competent evidence rather than by "conclusory or ipse dixit assertions." Bowne of New York City, 150 F.R.D. at 470 (citing & quoting inter alia von Bulow, 811 F.2d at 144, 146). See also In re Grand Jury Subpoena Dated July 6, 2005, 256 F. App'x at 382; DeAngels v. Corzine, 2015 WL 585628, *4 (S.D.N.Y. Feb. 9, 2015)

1. The Litchfield Cavo Memorandum

Litchfield Cavo served as coverage counsel for the carrier, and provided a memorandum to ASIC to respond to the client's request for legal advice following its receipt of a claim by Broadrock for business interruption. (Dennison Decl. ¶ 9 & Ex. C). Defendant has invoked the attorney-client privilege to bar disclosure of its lawyer's memorandum. (Id. ¶ 9 & Ex. D p. 2).

As described, the memorandum unquestionably comes within the definition of the attorney-client privilege under New York law, which grants protection to "confidential communication made between the attorney . . . and the client in the course of professional employment . . . ." CPLR § 4503(a)[1]. See, e.g., People v. Osorio, 75 N.Y.2d 80, 84, 550 N.Y.S.2d 612, 614 (1989); Matter of Bekins Record Storage Co., 62 N.Y.2d 324, 329, 476 N.Y.S.2d 806, 809 (1984). To successfully invoke the privilege, the proponent must show "that the information at issue was a communication between client and counsel or his employee, that it was intended to be and

[1] Since plaintiffs pursue only state-law claims, under Fed. R. Evid. 501 the attorney-client privilege issues are governed by state law. See, e.g., Dixon v. 80 Pine Street Corp., 516 F.2d 1278, 1280 (2d Cir. 1975); Few v. Yellowpages.com, 2014 WL 3507366, *2 (S.D.N.Y. July 14, 2014).

was in fact kept confidential, and that it was made in order to assist in obtaining or providing legal advice or services to the client." Bowne of New York City, 150 F.R.D. at 470-71 (citing inter alia Osorio, 75 N.Y.2d at 84, 550 N.Y.S.2d at 614; Matter of Bekins Record Storage, 62 N.Y.2d at 329, 476 N.Y.S.2d at 809). Accord HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64, 70 (S.D.N.Y. 2009); Aiossa v. Bank of Am., N.A., 2011 WL 4026902, *3 (E.D.N.Y. Sept. 12, 2011). The Dennison declaration sufficiently covers these elements (see Dennison Decl. ¶¶ 8-21), and plaintiffs now disclaim their initial demand to see the memorandum. (See Pls.' Mem. 5).

2. Executive Claim Summaries

Although defendant's motion did not mention any issue with respect to redactions from the so-called executive claim summaries, plaintiffs address these redactions in their opposition briefing. Specifically, they contend that these documents are not privileged or subject to work-product immunity, and that the redactions eliminated discussions of (1) the amounts reserved by defendant in response to Broadrock's claims and (2) certain reinsurance issues. Plaintiffs further cite caselaw for the proposition that reserve information may be be sufficiently relevant to justify its

production absent a privilege or work-product immunity. (Pls.' Mem. 5-7).

Defendants respond that the redactions concern only reinsurance calculations, not reserve information,[2] and that the deleted material simply identified the treaty reinsurance percentage participation for the policy and, on that basis, calculated the net exposure of ASIC as compared to the "gross exposure", a figure that is reflected in the unredacted portion of the executive claim summaries. (Def.'s Reply Mem 2-3). Defendant goes on to argue that such data is completely irrelevant to the claims and defenses in this case. (Id. at 3).

There is no reason to question the accuracy of defendant's counsel's description of the redacted material. Indeed, the record seems consistent with that revised characterization of the cited documents. (See Witkes Decl. Ex. 7). Moreover, plaintiffs' argument about relevance focuses on reserve information (Pls.' Mem 6-7 (citing cases)) and does not suggest why, at least in this case, reinsurance information of the type described by defendant's

[2] Defendant's counsel previously represented that the redactions included reserve information (Witkes Decl. Ex. 14), but now reports that the prior description was erroneous. (Def.'s Reply Mem 2-3).

counsel has any relevance to the parties' claims and defenses. Accordingly, we decline to order the production of those redacted segments.

3. The K&L Gates Memorandum

Defendant resists production of a memorandum prepared by K&L Gates while serving as coverage counsel for RIRRC, asserting both the attorney-client privilege and work-product protection. The first ground is untenable, but the second appears, on the current record, to be sustainable.

The memorandum was an internal document that summarized the status of the Town's pending litigation against RIRRC and undertook an evaluation of the potential exposure of the firm's client. (Dennison Decl. ¶ 24). Defendant also appears to represent at one point that the document was prepared initially as advice by K&L Gates for its client (Def.'s Mem. 8 (memo prepared to render legal advice to client)), although that assertion seems to be contradicted by the privilege-log entry describing that document as "Memo to File". (Dennison Decl. ¶ 22 & Ex. H).

Defendant's invocation of the attorney-client privilege cannot

be sustained for two reasons.[3] First, as noted, the document was apparently a memorandum prepared by a Gates attorney for insertion in the file, and there is no evidence in our record that it was provided to RIRRC or used to advise the client, or that it described or embodied the substance of any communication between the client and the attorney. In the absence of such a showing by defendant, the privilege would not apply, since it is limited to communications between client and attorney or between their respective representatives or with others "who are facilitating the rendition of legal services by the lawyer". Bodega Invs., LLC v. United States, 2009 WL 1456642, *2 (S.D.N.Y. May 14, 2009) (citing United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Lawrence v. Cohn, 2002 WL 109530, *2 (S.D.N.Y. Jan. 25, 2002); Weinstein's Federal Evidence §§ 503.11-503.12). It follows that the privilege does not protect "documents embodying uncommunicated thoughts of counsel, as in the form of notes or memoranda to the file." Bodega Invs., 2009 WL 1456642 at *9 n.5. Accord, e.g., Bowne

[3] We note that ASIC is asserting a privilege that belongs to RIRRC, not to the carrier, and that the work-product claim belongs to the Gates firm, not to ASIC or its counsel. There is no indication in the record that ASIC notified either entity that their materials were at issue here, and instead the carrier represents that it believes itself to be obliged to defend the confidentiality of the memorandum on their behalf. (Def.'s Mem. 7-8). This somewhat unusual circumstance is apparently responsible for the thinness of defendant's showing as to certain elements of the privilege and work-product claims.

of New York City, 150 F.R.D. at 490 (applying New York law & citing inter alia Kenford v. Cnty. of Erie, 55 A.D.2d 466, 469, 471, 390 N.Y.S.2d 715, 719 (4th Dep't 1977)). See also SCM Corp. V. Xerox Corp., 70 F.R.D. 508, 523 (D. Conn. 1976) (quoting Hickman v. Taylor, 329 U.S. 495, 508 (1947)).

The carrier's privilege claim also fails in view of the disclosure of the memorandum to the carrier's attorney. "The privilege is vitiated if the contents of the communication are disclosed to others for reasons other than assistance of the attorney in the performance of legal services." Bowne of New York City, 150 F.R.D. at 471 (applying New York law and citing inter alia Osorio, 75 N.Y.2d at 84, 550 N.Y.S.2d at 614; Matter of Estate of Baker, 139 Misc.2d 573, 576, 528 N.Y.S.2d 470, 473 (Surr. Ct. 1988); First Interstate Bank of Oregon, N.A. v. Nat'l Bank & Trust Co. of Norwich, N.A., 127 F.R.D. 186, 189 & n.2 (D. Ore. 1989) (applying New York law)). See also Atronic Int'l, GMBH v. SAI Semispecialists of Am., Inc., 232 F.R.D. 160, 162 (E.D.N.Y. 2005). That appears to have occurred in this instance.

The Gates firm apparently sent a copy of the memorandum to the carrier's coverage counsel on February 26, 2013 (Pls.' Mem. 8 & Witkes Decl. Ex. 19), although the exact circumstances of this

transmission and the status of the relationship at that time between RIRRC and ASIC are subject to some dispute. In brief, ASIC asserts that it was acting as the insurer for RIRRC at the time and that the Gates firm sent the memorandum to the carrier's outside counsel to assist the carrier in performing its duties on behalf of RIRRC. Although somewhat indirectly, ASIC appears to suggest that it thereby shared a common interest with RIRRC, so that the disclosure to the carrier's lawyers of that document did not waive any attorney-client protection. Defendant goes on to state that it has an obligation to its insured to preserve that confidentiality in the face of plaintiffs' demand for production. (Def.'s Mem. 7-8).

In contrast, plaintiffs argue that at the time that the memorandum was sent by the Gates firm to the carrier's lawyers, RIRRC and ASIC were effectively adversaries -- or at least did not share a sufficiently common legal interest -- because the carrier had not at that time agreed to coverage of the claims against the insured and disputed some of its defense costs.[4] As recounted by

[4] As noted, disclosure of privileged material to someone outside the attorney-client relationship may not trigger a waiver if the disclosure was made to facilitate the attorney's representation of the client. See, e.g., United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995). Examples include the use of an interpreter to translate attorney-client communications, e.g.,

plaintiffs, the transmission of the memorandum was made at a time when RIRRC and the carrier were in negotiations through their respective attorneys about coverage and related issues, a characterization that they say is supported by the contemporaneous emails and other documentation, which reflect that the carrier did not agree to substantial coverage until after the transmission of the memorandum. (Pls.' Mem. at 8-13; Witkes Decl. Exs. 7, 10, 19-24).

Ordinarily the disclosure of privileged material beyond the attorney-client relationship raises the specter of waiver. See, e.g., In re Cnty. of Erie, 546 F.3d 222, 225 (2d Cir. 2008); Adlman, 68 F.3d at 1499; Schwimmer, 892 F.2d at 243; In re Horowitz, 482 F.2d at 81. Nonetheless, the common-interest

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Osorio, 75 N.Y.2d at 84, 550 N.Y.S.2d at 615, or consultation with an accountant or other specialist to assist the attorney in understanding and analyzing complex financial or other technical issues. See, e.g., In re Horowitz, 472 F.2d at 80-81; United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Bodega Invs., 2009 WL 1456642 at *8. Defendant makes no showing that this type of purpose triggered the disclosure by the Gates firm to the carrier's counsel. Indeed, the record reflects, as we discuss below, that at the time of the disclosure, RIRRC and the carrier were negotiating to resolve their differences over whether the carrier was obliged to grant indemnity and to reimburse for certain defense costs, and that the proffer of the memorandum to the carrier's lawyer was apparently intended to assist the progress of the negotiations. In short, the disclosure was not intended to facilitate the rendition of legal services by the Gates firm to its client.

exception may extend protection to otherwise privileged communications even if they are disclosed to others who are not part of the privileged relationship, but it is applicable only if (1) the outside recipient of the material shared a common legal interest with the client, (2) the disclosure of the communication was intended to further that interest and (3) the privilege was not otherwise waived. See, e.g., Fitzpatrick v. American Int'l Grp., 2011 WL 350287, *4 (S.D.N.Y. Feb. 1, 2011); Strougo v. BEA Assocs., 199 F.R.D. 515, 525 (S.D.N.Y. 2001). See also Swerdlow, 259 F.R.D. at 71 ("Such a showing often exists in those instances in which . . . 'a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.'") (quoting Schwimmer, 892 F.2d at 243). To protect such disclosures from the imputation of waiver, the discovered party must show "that the parties shared a common interest and that they actively cooperated in formulating a common legal strategy." Fitzpatrick, 2011 WL 350287 at *4 (citing cases). As various courts have noted, "[t]he key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." Johnson Matthey, Inc. v. Research Corp., 2002 WL 1728566, *6 (S.D.N.Y. July 24, 2002) (citing cases).

The proffered correspondence between the two law firms makes

it apparent that at the time RIRRC and ASIC were not pursuing a common legal interest and that the carrier was carefully withholding any concession that it was obliged to provide coverage under the policy. Its original response to the claim of RIRRC, in July 2012, reserved its rights on coverage (Witkes Decl. Ex. 1) and in a follow-up meeting on July 27, 2012, the carrier denied that it was obligated to provide coverage although it offered, as a compromise, to provide $100,000.00 as a contribution to settlement of the lawsuit. (Dennison Decl. ¶ 32 & Ex. J). In a subsequent coverage letter, dated November 6, 2012, the carrier agreed, as it previously had, to provide a defense but reiterated its reservation of rights on coverage. (Witkes Decl. Ex. 4). Subsequently, the carrier specifically noted in several letters in January 2013 that it was not prepared to say that the potential liability of RIRRC was covered under the policy, and it repeatedly refused to authorize RIRRC to agree to a settlement of $3 million. (Witkes Decl. Exs. 21-22; see also id. Ex. 7).

From the record it is apparent that what was happening during the relevant period was a careful effort by the carrier to limit its risk by declining to concede coverage, disputing defense costs and engaging, in effect, in negotiations (apparently including a meeting on February 20, 2013) to resolve the stalemate between it

and RIRRC over questions of coverage and defense costs. Indeed, at one point RIRRC threatened to include ASIC in an ongoing coverage suit that it had commenced against another insurer, Indian Harbor (Witkes Decl. Ex. 7), and it was not until February 27 -- after delivery of the Gates memorandum -- that ASIC offered to agree to approve a settlement payment of $850,000.00, well below the amount that would have been required to resolve the Town's suit against RIRRC. (Witkes Decl. Ex. 24). Ultimately, in April 2013, long after the delivery of the Gates memorandum, the carrier formally agreed, along with Indian Harbor, to pay RIRRC $900,000.00 as partial funding of a settlement by that entity with the Town under which RIRRC was to pay $3 million over 20 years. (Witkes Decl. Ex. 10; see also Dennison Decl. ¶ 7; Pls.' Mem. 4).

The foregoing demonstrates that the carrier and RIRRC had conflicting legal interests. RIRRC was seeking maximum coverage for its projected liability and the costs of its defense, whereas the carrier was seeking to minimize its payments. In short, neither its legal nor its commercial interests were identical to, or even similar to, those of RIRRC. Necessarily, then, whatever attorney-client protection may have originally inhered in the Gates memorandum was presumably waived by its disclosure to ACIS. Accord Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp., 2002 WL

31729693, *14-15 (S.D.N.Y. Dec. 5, 2002) (discussing the inapplicability of the common interest doctrine "[w]here an insurer disclaims coverage and fails to provide a defense to its insured"); Int'l Ins. Co. v. Newmont Min. Corp., 800 F. Supp. 1195, 1196 (S.D.N.Y. 1992) ("Indeed, where a carrier declines to defend, a climate of actual antagonism between the insured and the carrier is more likely.") (discussing the common-interest doctrine in the insurance context).

That said, we nonetheless find that defendant's invocation of work-product immunity rests a on a more solid foundation. As noted, the Gates memorandum apparently provided a recapitulation of the status of the Town's lawsuit against RIRRC and offered some assessment by the Gates attorney as to the prospects for his client in that litigation. (See Pls.' Mem. 8 & Witkes Decl. Ex. 19). This is of course classic work product.

Significantly, the waiver rules applicable to work product differ from those applied to the attorney-client privilege in that waiver of work product is less readily recognized. "Work product waiver will generally be found if the party has disclosed the work product to its adversary, although disclosure to certain adversaries will not always require waiver vis-a-vis others."

Bodega Invs., 2009 WL 1456642 at *4 (citing Plew v. Limited Brands, Inc., 2009 WL 1119414, *3 (S.D.N.Y. April 23, 2009) (citing inter alia In re Steinhardt Partners, LP, 9 F.3d 230, 235-36 (2d Cir. 1993))). The courts have also found that disclosure to a non-adversary may trigger waiver if the disclosure was made in circumstances that make it probable that the otherwise protected material will be transmitted to an adversary of the litigant. See, e.g., Plew, 2009 WL 1119414 at *3 (citing inter alia Seven Hanover Assocs. LLC v. Jones Lang LaSalle Americas, Inc., 2005 WL 3358597, *1 n.3 (S.D.N.Y. Dec. 7, 2005)). In contrast, however, "disclosure simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver." In re Gulf Oil/Cities Serv. Tender Offer Litig., 1990 WL 108352, *4 (S.D.N.Y. July 20, 1990). Accord, e.g., Bodega Invs., 2009 WL 1456642 at *4; Plew, 2009 WL 1119414 at *3.

In this case the disclosure to the carrier of the work product embodied in the Gates memorandum cannot be viewed as disclosure to an adversary. The work product was created in the context of the Town's suit against RIRRC, and it embodied an attorney's assessment of that litigation. Thus the pertinent adversary for waiver purposes is the Town, not the carrier. Moreover, disclosure to ACIS

was not done in circumstances that suggested a likelihood of disclosure to the Town, or indeed any plausible scenario in which the document would ultimately be revealed to the Town. It was provided to the carrier for the evident purpose of supporting the insured's effort to encourage the carrier to cover a more substantial share of any impending damages exposure by RIRRC and presumably also to justify the defense costs for which the insured was seeking reimbursement.

In short, this scenario reflects "disclosure simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary". In re Gulf Oil/Cities Serv. Tender Offer Litig., 1990 WL 108352 at *4. That being the case, work-product immunity for the Gates memorandum has not been waived.

Finally, we note that although the work-product principle offers only qualified protection, plaintiffs have shown no basis for invading that immunity. Briefly, to justify overcoming an otherwise valid claim of factual work product, the discovering party must demonstrate that it has "substantial need" for the information found in the document and that it cannot obtain equivalent information from other sources without "undue hardship".

See, e.g., In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 383 (2d Cir. 2003); Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 12 (2d Cir. 1989); Bodega Investments, 2009 WL 1456642 at *3-4. If, however, the withheld document contains so-called mental-processes work product of the lawyer -- as is apparently the case here -- even a showing of "substantial need" and "undue hardship" may not justify mandated production. See, e.g., United States v. Adlman, 134 F.3d 1194, 1204 (2d Cir. 1998); Bodega Investments, 2009 WL 1456642 at *3. In any event, plaintiffs have not sought to make any showing with respect to the Gates memorandum, and hence there is no occasion to bypass the presumptive protection of Rule 26(b)(3).

4. Drafts and Metadata

Plaintiffs initially sought copies of any drafts and metadata involving four coverage-position letters sent to Broadrock from ACIS. The four letters were apparently sent on July 6, October 18, November 6 and November 13, 2012, respectively. (Dennison Decl. ¶¶ 27-28). Defendant resists this demand, arguing that the drafts and metadata are irrelevant, and are, in any event, protected by the attorney-client privilege and work-product immunity. (Def.'s Mem. at 8-10). In plaintiffs' response, they appear to target only the

drafts, if any, for the July 6 letter. (Pls.' Mem. at 13-15).

Defendant argues that the drafts have no pertinence because the carrier was bound only by the final versions of its letters, which were sent to Broadrock. (Def.'s Mem. 8-9). The short answer is that the drafts are potentially relevant insofar as they may contain admissions that were then deleted in the process of editing. That phenomenon would at least be helpful to plaintiffs in pursuing their assertion that the carrier's performance was in bad faith. Accord Walker v. Time Life Films, Inc., 784 F.2d 44, 52 (2d Cir. 1986) (discussing the "useful[ness]" of "early drafts" of a screenplay in a copyright action); Feld v. Fireman's Fund Ins. Co., 292 F.R.D. 129, 136 (D.D.C. 2013) ("[D]raft invoices are relevant for discovery purposes, as they may show charges . . . added or substracted for one reason or another before submitting the final invoices."); In re ML-Lee Acquisition Fund II, L.P., 151 F.R.D. 37, 41-42 (D. Del. 1993) ("[D]rafts of certain specific documents may be relevant, and, therefore, discoverable."). See also Sahu v. Union Carbide Corp., 746 F. Supp. 2d 609, 614 (S.D.N.Y. 2010).

As for the attorney-client privilege, defendant rests its case on the assertion that the drafts were sent to the carrier's outside counsel for review before they were finalized. (Dennison Decl. ¶

30). Although defendant is less than specific on the point, it is apparently implying that counsel made or suggested changes, and that a comparison of the drafts and the final products would disclose the substance of counsel's advice in this respect.

It bears emphasis that a document prepared in the ordinary course of business cannot be shielded by the simple stratagem of sending a copy to an attorney. See, e.g., Koumoulis v. Indep. Financial Marketing Grp., Inc., 29 F. Supp. 3d 142, 146 (E.D.N.Y. 2014) (quoting United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994) (citing Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987))). Nonetheless, there appears to a basis for inferring from some snippets of deposition testimony that counsel did make or suggest changes to, at least, the October and November draft letters, in which case the drafts would be protected by the privilege. (See Dennison Decl. Ex. F at 154-55).[5]

[5] We note that defendant's representative, Mr. Jeffrey Leung, displayed some uncertainty as to whether the carrier's outside counsel had reviewed the draft letters, but ultimately recalled that he had done so for the period after the lawyer's retention, which occurred on July 20, 2012. Plaintiffs' counsel then eschewed questioning Mr. Leung about the nature of the lawyer's advice in this respect. (Dennison Decl. Ex. F at 156). Although defendant's showing on the privilege question is far from robust, since it fails to proffer competent evidence specifically demonstrating that counsel offered any advice on the draft

The situation with the July 6 letter is notably different, and that difference explains plaintiffs' focus on it. At the time that this letter was drafted and mailed, the carrier had not yet hired coverage counsel. Indeed, counsel was not retained until two weeks later. Accordingly, the letter was apparently drafted by Mr. Leung and reviewed only by his supervisor, Ms. MariKay Fish, whom defendant does not identify as a lawyer. (Dennison Decl. ¶¶ 31-32; see Pls.' Mem. 14).

Given this circumstance, defendant does not invoke the attorney-client privilege, but instead suggests that the drafts are protected by work-product immunity or some variant of that principle. (Defs.' Mem. at 9-10). The carrier asserts that "[a]ny initial draft, and any comments or changes thereto by Mr. Leung's manager, reflect the 'mental impressions, conclusions, opinions or legal theories' developed by those representatives of ASIC." (Id.; see Dennison Decl. ¶ 31). Defendant goes on to assert that "[l]itigation was reasonably anticipated at the time Mr. Leung prepared the July 6, 2012 letter. The facts here demonstrate a

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letters, plaintiffs have chosen not to challenge that failing, and we may infer the likelihood that the lawyer did offer some advice on each of the last three letters. See, e.g., United States Postal Serv., 852 F. Supp. at 162-63 (drafts reviewed by counsel and altered as a result may be protected by privilege).

shift from 'ordinary course of business to anticipation of litigation.'" (Def.'s Mem. at 10; see Dennison Decl. ¶ 32).

This argument is untenable. The availability of work-product protection for a document turns on whether the document in question was created because of pending or anticipated litigation. See, e.g., Adlman, 134 F.3d at 1202-03.[6] Under this standard, Rule 26(b)(3) does not protect documents that were "prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." Id. at 1202. See, e.g., Fitzpatrick v. American Int'l Group, Inc., 2011 WL 335672, *2 (S.D.N.Y. Jan. 28, 2011). It also bears emphasis that documents created because of a lawsuit in which the creator of the document was not itself involved are not covered by work-product protections. See, e.g., Ramsey v. NYP Holdings, Inc., 2002 WL 1402055, *6-7 (S.D.N.Y. June 27, 2002).

In this case, defendant's anticipation-of-litigation assertion misses the mark. The business of the carrier is to provide policy coverage and then to assess whether a claim by an insured is

[6] The standards applicable to work-product immunity are governed by federal law. See, e.g., Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 105 (S.D.N.Y. 2007); Bowne of New York, 150 F.R.D. at 471 (citing cases).

subject to coverage under the terms of the policy. Thus, the July 6, 2012 letter, which acknowledged an obligation to provide a defense and reserved the carrier's rights on indemnity, was necessarily created in the ordinary course of business. At that early stage, the relationship between the carrier and the insured had not ripened into such an adversarial stance as to justify a conclusion that the document was written because of anticipation by ACIS of litigation with Broadrock, and defendant offers no evidence that the substance of the letter was significantly affected because the carrier anticipated litigation.[7] As in numerous other insurance coverage cases, the standard documentation and communications of a carrier in the wake of the filing of a claim under its policy and during claims investigations and assessments is generally deemed ordinary-course-of-business material. See, e.g., U.S. Fidelity & Guaranty Co. v. Braspetro Oil Servs. Co., 2000 WL 744369, *8-9 & n.7 (S.D.N.Y. June 8, 2000) (citing cases). Accord, e.g., QBE Ins. Corp. v. Interstate Fire & Safety Equip. Co., 2011 WL 692982, *2-4 (D. Conn. Feb. 18, 2011). See also Safeco Ins. Co. v. MES Inc., 2013 WL 1680684, *5 (E.D.N.Y. April 17, 2013). Indeed,

[7] The letter, and indeed Broadrock's coverage claim, were of course written because of litigation -- that is, the Town's lawsuit against Broadrock and RIRRC -- but that fact does not trigger work-product coverage for the document. See generally Ramsey, 2002 WL 1402055 at *6-7.

"[d]istinguishing between documents prepared in anticipation of litigation and those created in the ordinary course of business is particularly fact specific in the insurance context because 'the very business' of an insurance company 'is to evaluate claims that may ultimately ripen into litigation.'" Gov't Employees Ins. Co. v. Saco, 2013 WL 5502871, *2 (E.D.N.Y. Oct. 2, 2013) (quoting Weber v. Paduano, 2003 WL 161340, *4 (S.D.N.Y. Jan. 22, 2003)).

Finally, we note that defendant's contention that it was sufficiently anticipating litigation in July 2012 to trigger work-product coverage is in evident tension with its earlier assertion, in connection with the Gates memorandum, that on February 26, 2013 the carrier and Broadrock were pursuing a common interest. If the carrier was preparing as early as July 2012 for litigation with its insured, it cannot plausibly be said that as of February 26, 2013 -- before it had conceded any legal obligation to provide indemnity -- it had resolved its differences with Broadrock so as to be pursuing an identical legal interest with the insured.

In sum, defendant is to provide to plaintiffs' counsel any drafts of the July 6, 2012 coverage letter and any metadata pertaining to that letter. This is to be done within seven days.

CONCLUSION

For the reasons stated, defendant's motion for a protective order is granted in part and denied in part, as specified.

Dated: New York, New York
March 2, 2015

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Memorandum and Order have been mailed today to:

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