IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE CHARTER OAK FIRE INSURANCE COMPANY, et al.	*	
v.	*	
AMERICAN CAPITAL, LTD., et al.	*	Civil No. DKC 09-100

MEMORANDUM OPINION

Pursuant to the referral of this case for resolution of discovery disputes, the court has reviewed Defendants' Motion to Compel Based on Newly Discovered Evidence/Defendants' Opposition to Plaintiffs' Counsel's Certification of Plaintiffs' Vaughn Indices, ECF No. 193, Plaintiffs' opposition, Defendants' reply, Plaintiffs' surreply and Plaintiffs' Motion for Leave to Submit Declaration of Paul Janaskie, Esq. *in Camera*, ECF No. 202. No hearing is necessary. *See* Local Rule 105.6. The motion to compel will be granted, and the motion to submit declaration will be deferred.

The procedural and factual background of this case is set forth in Chief Judge Chasanow's opinion of February 11, 2013, ECF No. 170, and will not be repeated here except as pertinent to this motion. On November 20, 2012, Defendants moved to compel production of Plaintiffs' claims handling materials. ECF No. 125. Plaintiffs opposed this motion on the basis that the requested materials were protected by attorney-client privilege and the work product doctrine. ECF No. 130. Because claims handling is an ordinary business function of an insurer, Plaintiffs could not claim these protections unless they established that: (1) counsels' work on the underlying heparin claims was not performed for a typical business purpose, and (2) the documents were not prepared in the ordinary course of business. *See* ECF No. 170 at 14; *see also Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos.*, 123 F.R.D. 198, 202 (M.D.N.C.

1998) ("An insurance company cannot reasonably argue that the entirety of its claims files are accumulated in anticipation of litigation when it has a duty to investigate, evaluate and make a decision with respect to claims made on it by its insured.") (citing *W. Nat. Bank of Denver v. Employers Ins. of Wausau*, 109 F.R.D. 55 (D. Colo. 1985)); *see also E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 415-16 (1998) ("'Only those attorney-client communications pertaining to legal assistance and made with the intention of confidentiality are within the ambit of the privilege.'") (quoting *Burlington Indus. v. Exxon Corp.* 65 F.R.D. 26, 37 (D. Md. 1974)). The *Burlington* court also noted that "materials assembled in the ordinary course of business or for nonlitigation purposes are not under the partial immunity granted by [Rule 26] subsection(b)(3)." 65 F.R.D. at 42.

In addition, Maryland law requires insurance companies to adopt and implement reasonable policies and procedures for the prompt investigation of claims, MD. CODE ANN., INS. § 27-304(3), and functions performed pursuant to this statutory mandate occur in the ordinary course of business without the protection of attorney-client privilege or the work product doctrine. Thus, investigative reports prepared prior to a coverage decision are generally prepared in the ordinary course of business. *Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422-23 (S.D.N.Y. 1981). To enjoy work product protection, the insurer must present "specific evidentiary proof of objective facts demonstrating a resolve to litigate." *Pete Rinaldi's*, 123 F.R.D. at 202; *see also Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 656 (M.D.N.C. 1995) (documents prepared when litigation is anticipated do not enjoy work product protection if they are prepared in the regular course of business).

In their written opposition and during oral argument on Defendants' first motion to compel, Plaintiffs contended that after September 2, 2008, all claims-related matters occurred

solely in anticipation of coverage litigation. To support this contention, they relied on deposition testimony, an affidavit, and an email from Plaintiffs' claims handler Edward Zawitoski. Mr. Zawitoski's affidavit stated [redacted]

[redacted]

ECF No. 134-4. Plaintiffs' opposition characterized Mr. Zawitoski's deposition testimony as [redacted] CF No. 130 at 6 (emphasis added) [redacted] ECF No. 134 at 10. During oral argument, Plaintiffs' counsel argued that insurers often have

> two separate claims processes going on. There is one that is handling the underlying claim . . . . And then the second part of the claim process is discussing wherever there is coverage. In this particular case . . . *the first aspect of that and handling the claim on behalf of the policy holder, never happened*. . . . The only thing that Mr. Zawitoski was involved in because he was not able to meet with counsel and then they turned over their entire – with me December 2008 and the only thing that you can look at even preliminarily was the question in the coverage.

ECF No. 149 at 56-57 (emphasis added). Counsel noted that "there is no doubt that everybody is in no dispute that everybody is anticipating litigation." *Id.* at 57.

While the court did not accept Mr. Zawitoski's claim that everything done after September 2, 2008, was in anticipation of litigation, it did rely on an email issued by Mr. Zawitoski, [redacted] in holding that from September 18, 2008 forward, Plaintiffs' in-house and outside counsels' activities fell outside the

ordinary business function of claims handling and thus were entitled to attorney-client privilege and work product protection. ECF No. 148.[1]

Defendants now seek reconsideration of that ruling in a renewed motion to compel production of claims handling materials. They contend that newly discovered evidence reveals that Plaintiffs did not anticipate litigation "any earlier than December 8, 2008, . . . or December 19, 2008," ECF No. 193 at 6, and were engaged in ordinary claims handling work which generated materials that are neither privileged nor protected and thus should be produced.[2]

The evidence cited by Defendants derives largely from two recent depositions. In April 2013, Mr. Zawitoski testified for the first time about activities performed by in-house and outside counsel after September 18, 2008. Many of these activities are ordinary claims handling matters. For example, [redacted] ECF No. 193-5 at 22. [redacted] *Id.* at 24-26. [redacted] *Id.* at 27-28. [redacted] *Id.* at 48-50. [redacted]

[1] The court also ruled that Plaintiffs had waived these protections by asserting a claim for recission of the policy; upon Plaintiffs' objections, Chief Judge Chasanow limited the scope of the waiver to factual material relevant to the rescission claim. ECF No. 170.

[2] Defendants do not seek production of "forty or so" documents which they believe pertain to legal advice. ECF No. 193 at 6.

[redacted] ECF No. 193-22. [redacted] [redacted] ECF No. 193-5 at 47.

Ms. Seitz was also deposed in April 2013. [redacted] [redacted] ECF No. 193-6 at 22-23. [redacted] [redacted] [redacted] *Id.* at 8-9.

Mr. Zawitoski's new deposition testimony cannot be reconciled with his previous deposition testimony and affidavit, which formed the basis for Plaintiffs' opposition to Defendants' motion to compel. [redacted] [redacted] ECF No. 134-4. [redacted] [redacted] ECF No. 134 at 10. [redacted] [redacted] ECF No. 170 at 16 [redacted] [redacted] [redacted] ECF No. 193-5 at 47. [redacted] [redacted] [redacted]

Plaintiffs' opposition to the renewed motion to compel does not address the fact that they presented evidence and arguments to the court which are, in hindsight, misleading. With considerable audacity, Plaintiffs instead claim that Defendants' "new" evidence should not be considered because: (1) it is either not new or could have been discovered before Defendants'

original motion to compel was filed; or (2) Defendants previously conceded that all parties anticipated litigation as of September 18, 2008. ECF No. 199 at 11-18.

The claim that the evidence is not new is particularly puzzling. Plaintiffs assert that Defendants "were free to ask at Mr. Zawitoski's original deposition . . . questions regarding . . . whether Travelers had plans to deny coverage as of September 2, 2008." ECF No. 199 at 17. But by Plaintiffs' own admission, Defendants tried, but were not permitted, to question Mr. Zawitoski about when he first learned that Travelers had a basis for rescinding coverage. *See* ECF No. 130 at 28-29 and ECF No. 134 at 29-30. Moreover, Mr. Zawitoski's new testimony concerns the period *after* September 2, 2008, a period about which Defendants could not question him at all until April 2013. *Id.* Plaintiffs also contend that the claims handling guidelines were previously available, *id.*, but again, what is new and significant is the recent testimony that *lawyers handled* some of these claims handling functions. Plaintiffs do not address the Seitz deposition at all, other than to point out that elsewhere in her testimony she [redacted] ECF No. 199-6 at 11.

Plaintiffs badly misconstrue the relevant legal principles as well. Defendants' new evidence reveals that at least two of Plaintiffs' employees did not anticipate litigation as early as previously claimed. Plaintiffs respond with the irrelevant proposition that attorney-client and work product protections are not *per se* unavailable before the insurer *determines* to deny coverage. They state: "'[A]n insurer may produce evidence of circumstances that support the conclusion that it reasonably anticipated litigation prior to denial of the claim,' just as Travelers did in responding to the prior motion to compel." ECF No. 199 at 14 (quoting *Federated Mut. Ins. Co. v. Williams Trull Co.*, 838 F. Supp. 2d 370, 420 (M.D.N.C. 2011). But of course, the evidence the insurer produces must be sufficient to sustain its burden to show that the disputed

material was not prepared primarily for the ordinary business purpose of adjusting insurance claims. It goes without saying that if the evidence is later shown to have been misleading or inaccurate, it is no longer sufficient to sustain that burden.

Plaintiffs also contend that Defendants previously conceded that all parties anticipated litigation by September 18, 2008, and, having successfully relied on that date in defeating Plaintiffs' motion to compel, are bound by that reliance. Of course, any concession as to when Defendants anticipated litigation is unrelated to when Plaintiffs anticipated litigation. And the concession as to Plaintiffs' date was made in the context of evidence and arguments now shown to have been inaccurate.

Having determined to reconsider whether, and at what point, Plaintiffs may claim attorney-client and work product protection for their claims handling materials, the court now turns to that question. As noted, Plaintiffs have the burden of proving their entitlement to attorney-client privilege and work product protection for the materials sought by Defendants.

Only two of Plaintiffs' employees have provided any direct evidence of when Plaintiffs anticipated litigation of coverage issues. Mr. Zawitoski stated that [redacted] but this is often a necessary part of the claims handling process. A claims handler's request that counsel review coverage does not automatically convert the analysis from an ordinary business activity to a litigation-geared activity. In addition, Mr. Zawitoski testified to several activities, which must be performed when handling any claim, that were done by counsel in this case. Plaintiffs do not dispute that insurers at times retain outside counsel who are "simply acting as a claim handler," and when they do so, privilege and work product protection are not available. ECF No. 149 at 55-57; *see also* ECF No. 170 at 14.

Particularly in light of his specific testimony regarding claims handling functions, Mr. Zawitoski's [redacted] is not objective evidence of anticipation of litigation.

Ms. Seitz testified [redacted] To be sure, she also claimed, numerous times, [redacted] but again [redacted] does not sustain the insurer's burden of producing objective evidence of a reasonable anticipation of litigation. Her conclusory claim that [redacted] Her testimony that it [redacted] " ECF No. 199-6 at 72, [redacted]

In a last ditch attempt to salvage the finding that they anticipated litigation as of September 18, 2008, Plaintiffs cite to internal emails, many of which involve unidentified persons, which discuss coverage of these claims. They also note that they retained outside "coverage counsel" in early September 2008. However, they concede that "[a]ll of these discussions and preparations for litigation took place *before* . . . September 18." ECF No. 199 at 22 (emphasis in original). The court has already ruled, three times, that Plaintiffs failed to show that they anticipated litigation before September 18, ECF Nos. 148, 170, 184, and reliance on activities occurring before that date is accordingly misplaced. In any event, a decision to examine coverage is not the same as anticipating litigation.

Similarly, the post-September 18 communications are not persuasive. First, having contended that Defendants' new evidence should not be considered because Defendants did not present it with their original motion to compel, Plaintiffs now ask the court to consider evidence which they possessed but chose not to discuss when they were opposing that original motion. As Plaintiffs aptly point out, courts need not consider belated arguments that should have been brought to the court's attention when it made its original decision. *See Skeen v. Faison*, No. 92-2592, 1993 WL 122641, at *1 (4th Cir. 1993); *see also Almy v. Sebelius*, 749 F. Supp. 2d 315, 338 (D. Md. 2010), *aff'd*, 679 F.3d 297 (4th Cir. 2012) (denying motion for reconsideration under either Rule 59(e) or Rule 60(b) where party presented "arguments that were available to her and should have been raised in her initial [m]otion").

In any event, Plaintiffs' newly-discussed evidence does not sustain their burden. The post-September 18 communications all were written by, or in one case to, Mr. Zawitoski, who we now know did not anticipate denying coverage at that time. Indeed, in light of his recent testimony, even Mr. Zawitoski's September 18 email is scant, if any, evidence that litigation was anticipated. Plaintiffs rely on the statement that [redacted] ECF No. 199 at 22. However, the cases they cite for the proposition that a reservation of rights evidences anticipation of litigation all involve a formal reservation of rights letter, not a mere email, particularly one written by a claims handler who was not anticipating coverage litigation at the time. Similarly, statements in the September 18 email and subsequent statements that [redacted] do not prove a resolve to litigate or the anticipation of litigation. Finally, to the extent that the communications indicate that *Defendants* anticipated litigation, they do not provide proof of when Plaintiffs did so.

Despite Chief Judge Chasanow's rejection of the "all-in" approach Plaintiffs previously took with respect to their claims handling documents, ECF No. 184 at 10, Plaintiffs take the same approach now. Judge Chasanow noted that Plaintiffs "relied on the testimony of a single Travelers employee in an attempt to shield virtually all materials reflecting any factual investigation or coverage analysis conducted after the retention of counsel on September 2, 2008." *Id.* at 10-11. She noted that Plaintiffs never attempted to distinguish materials related to legal advice from factual investigations conducted in the ordinary course of business, making instead the strategic decision to claim "near-blanket" protection for every document in the claims handling file. *Id.* Even now, despite Mr. Zawitoski's testimony, Plaintiffs have neither retracted nor qualified their assertion that the ordinary process of handling the underlying claims "never happened." ECF No. 149 at 56.

Judge Chasanow concluded that Plaintiffs had failed to establish that *all* of the withheld documents were necessarily privileged; thus, their sweeping assertions of privilege and work product protection were rejected. Now, even in the face of evidence that at least some claims handling matters were underway after September 18, 2008, Plaintiffs continue to assert an all-inclusive claim of privilege and work product protection for their files after that date. This strategic decision failed before, and it fails again.

In conclusion, the evidence on which Plaintiffs newly rely is woefully insufficient to overcome the explicit testimony of the only two employees whose statements of their intentions regarding litigation are available. The court previously gave Plaintiffs the benefit of the doubt in finding that they anticipated litigation on September 18, 2008. Once again, giving Plaintiffs the benefit of the doubt, the court finds that Plaintiffs have demonstrated that they anticipated litigation as of December 8, 2008[redacted]

[redacted] Plaintiffs have failed to sustain their burden of proving entitlement to attorney-client or work product protections prior to December 8, 2008, and all materials created prior to that date must be produced.[3]

The court will defer *in camera* review of documents dated after December 8, 2008, and thus will defer consideration of Defendants' claim that Plaintiffs have waived protection for post-December 18 documents relating to counsels' recission advice, and consideration of Plaintiffs' motion for leave to submit an *in camera* document to supplement the privilege log. ECF No. 202. Once Defendants have received Plaintiffs' pre-December 8, 2008 documents, they may, within thirty days, supplement their previously submitted objections to Plaintiffs' privilege logs. The court will then determine how to handle any remaining *in camera* review.[4] In making this determination, the court will consider the fact that Plaintiffs have unduly delayed discovery. After the misleading nature of their evidentiary basis for claims of attorney-client privilege and work product protection was exposed, first in depositions and then in Defendants' motion, Plaintiffs chose not to alter or modify their position. They also inappropriately responded to the order that they produce documents for *in camera* review, dropping off two large boxes, each containing approximately 6 inches of paper, without any attempt to organize or meaningfully identify any document, much less match any document with an entry on a privilege log. *See* ECF No. 183 at 3-4. This dump on the court alone could have justified a ruling that Plaintiffs were not entitled to withhold those documents. *See, e.g., Pete Rinaldi's*, 123 F.R.D. at 203; *Kelchner v. Int'l Playtex, Inc.*, 116 F.R.D. 469, 472 (M.D. Pa. 1987)

[3] As noted, *Defendants* identified some 40 documents which they do not seek because they appear to contain legal advice. Plaintiffs are the fortunate beneficiaries of Defendants' diligence. Defendants are directed to identify these documents prior to Plaintiffs' production.

[4] Plaintiffs' corrected document submission fills four large binders and consists of 370 multi-page documents. Some of these documents are dated prior to December 8, 2008, and thus will not need *in camera* review; it is unclear how many documents will continue to be disputed.

("Submitting a batch of documents to the court *in camera* does not provide an adequate or suitable substitute for complying with production. Often courts are without information to know what a document concerns, or whether the privilege should be sustained. In addition to description, an index should contain precise and certain reasons for preserving confidentiality or privilege."). In retrospect, that ruling should have been made, because the submission was part of what has now emerged as a pattern of gamesmanship designed to prevent and unduly delay the production of documents to which Defendants are entitled.

Due to the filing of many of the exhibits and memoranda related to this motion under seal, this opinion will be filed under temporary seal. The parties will have 30 days to jointly suggest any redactions that should be made before it is released to the public docket.

Date: July 24, 2013

/S/
JILLYN K. SCHULZE
United States Magistrate Judge