IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

East Bridge Lofts Property Owners Association, Inc.; Creekstone Builders, Inc.; and Creekstone SC I, LLC, Plaintiffs, vs. Crum & Forster Specialty Insurance Company, Defendant.	Civil Action No. 2:14-cv-2567-RMG **ORDER**

Plaintiff has served a subpoena on Defendant's counsel Rodrigo Garcia, Jr. ("Garcia"). Defendant moves to quash the subpoena and moves for a protective order related to the subpoena. (Dkt. No. 56). In addition, Defendant moves to exclude and protect privileged communications that Defendant claims it inadvertently produced to Plaintiffs. (Dkt. No. 44.) For the reasons stated below, Defendant's motion to quash order is GRANTED IN PART and DENIED IN PART, Defendant's motion for protective order is DENIED, and Defendant's motion to exclude and protect privileged communications is DENIED.

I. BACKGROUND

In this civil action, Plaintiffs East Bridge Lofts Property Owners Association, Inc. (the Association); Creekstone Builders, Inc.; and Creekstone SC I, LLC (Creekstone SC) bring, *inter alia*, a claim for bad faith against Defendant insurer Crum & Forester Specialty Insurance Company for failure to settle a third-party claim brought against Creekston SC. The facts are drawn from Plaintiff's amended Complaint when possible. On December 13, 2010, the Association filed suit in the underlying action against Creekstone SC and others. (Dkt. Nos. 11-1

at 1; 27 at ¶¶ 1, 2, 10.) On May 23, 2014, Defendant filed a declaratory judgment action in Texas state court, seeking a declaration that it was not obligated to defend, indemnify, or provide liability coverage to Creekstone SC and other related parties in the underlying action. (Dkt. No. 11-2.) This action was later dismissed. (Dkt. No. 19-1.) Following a jury verdict in the underlying action for the Association of $55,000,000.00, judgment was entered against Creekstone SC for the entire amount. (Dkt. No. 27 ¶¶ 10, 11.) Prior to trial, Defendant attended a mediation of the underlying suit in 2014, but allegedly "failed to make a meaningful offer." (*Id.* ¶ 16.) Other than the mediation, Defendant did not participate in the underlying suit. (*Id.* ¶ 15.)

On October 1, 2014, Defendant provided its initial production of discovery to Plaintiff without an accompanying privilege log. (Dkt. No. 59 at 3.) On March 24, 2015, Plaintiffs filed a second amended Complaint and attached correspondence, labeled as C&F 001863-001865, that had been produced by Defendant. (Dkt. No. 38-1.) On April 3, 2015, Defendant sent Plaintiffs notice that it intended to "snap back" this correspondence under Federal Rule of Civil Procedure 502. (Dkt. No. 59 at 6.) Defendant then filed a motion to exclude and protect privileged communications, (Dkt. No. 44), to which Plaintiffs filed a response, (Dkt. No. 59).

On May 8, 2015, Plaintiffs issued a subpoena to Defendant's coverage counsel, Garcia. (Dkt. No. 56 at 1.) Garcia currently serves as Defendant's litigation counsel. (*Id.* at 2.) Defendant then filed a motion to quash and motion for protective order, (Dkt. No. 56), to which Plaintiffs filed a response, (Dkt. No. 70).

II. LEGAL STANDARD

Parties to civil litigation may obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense," including any information that "appears reasonably

calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Courts are to construe broadly rules enabling discovery. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 983 (4th Cir. 1992) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). Conversely, limitations on discovery are to be construed narrowly. *See, e.g.*, *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998) ("attorney-client privilege is to be narrowly construed"); *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 748 (D. Md. 2007) ("assertions of evidentiary privilege are narrowly and strictly construed").

In diversity cases, the availability of an evidentiary privilege is governed by the law of the forum state. Fed. R. Evid. 501; *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 107 n. 5 (4th Cir. 1995). The Court has not decided whether South Carolina or Texas law applies to this action, but both parties cite South Carolina law and Defendant has not shown how the result would differ under Texas law. The Court therefore analyzes Defendant's motion under South Carolina law. Attorney-client privilege consists of the following essential elements: "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except where the protection is waived." *Tobaccoville USA, Inc. v. McMaster*, 692 S.E.2d 526, 530 (S.C. 2010).

Federal law, however, governs the work-product doctrine in diversity cases. *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988). Under Rule 26(b)(3) of the Federal Rules of Civil Procedure, documents prepared "in anticipation of litigation" are generally protected from discovery, whether they were prepared by a party's attorney, consultant, or other agent. Discovery of work-product may, however, be appropriate where the

party seeking it has a "substantial need for the materials . . . and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* The party claiming work-product protection has the burden of establishing entitlement to it. *Sandberg v. Va. Bankshares, Inc.*, 979 F.2d 332, 355 (4th Cir. 1992).

Defendant has moved for an order quashing a subpoena *duces tecum*. Rule 45 requires courts to quash subpoenas in certain circumstances and allows courts to quash subpoenas in others. Fed. R. Civ. P. 45(d)(3). As is relevant here, a subpoena must be quashed if it "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45.

Defendant has also moved for a protective order forbidding Plaintiffs from seeking discovery of Garcia's files. Rule 26, which governs protective orders, provides that a court may "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). In response to a motion for protective order under Rule 26(c), a court may also limit the extent of discovery if it concludes that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) (quoting Fed. R. Civ. p. 26(b)(2)).

III. DISCUSSION

A. Motion to Quash and Motion for Protective Order

Plaintiffs have requested Garcia's "entire file for the time period beginning October 1, 2012 and ending June 19, 2014, pertaining to" certain insurance policies issued by Defendant and pertaining to the underlying action. (Dkt. No. 70 at 9–10.) Defendant objects that this request calls for documents subject to attorney-client privilege and the work-product doctrine. (Dkt. No. 56 at 1–5.) Defendant further objects that Plaintiffs "do not have a legitimate basis for demanding" "the relatively few non-privileged documents in Garcia's files." (*Id.* at 4.) Defendant has filed its motion to quash and motion for protective order on these grounds.

1. Attorney-Client Privilege

In South Carolina, the party asserting attorney-client privilege must establish lack of waiver. *Hege v. Aegon USA, LLC*, C/A No. 8:10-1578-GRA, 2011 WL 1791883, at *4 (D.S.C. May 10, 2011). "One way a party may implicitly waive the privilege is by placing a privileged communication 'at issue' in a case." *Id.*; *City of Myrtle Beach v. United Nat'l Ins. Co.*, C/A No. 4:08-1183-TLW-SVH, 2010 WL 3420044, at *4 (D.S.C. Aug. 27, 2010) ("[I]f a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntarily waives, explicitly or impliedly, the attorney-client privilege.") (citation omitted).

Determining whether a communication has been put "at issue" in a bad faith action is particularly nettlesome. *Myrtle Beach*, 2010 WL 3420044 at *4. The determination implicates "[c]onflicting policies," with "[t]he time-honored attorney-client privilege" on one side and "the duty of good faith and fair dealing an insurer owes to its insured" on the other. *Id.* Nevertheless, "[a]n insurer's thoughts and knowledge are at the center of a claim for bad faith," *id.*, and the basis for the insurer's evaluation of a claim is highly relevant—if not essential—to proving those

"thoughts and knowledge," *id.* Thus, courts applying South Carolina law have held that, where an insurer in a bad faith claim asserts as an affirmative defense that it acted reasonably and in good faith, the insurer puts at issue the evidence it had before it at the time it denied the claim, including communications with counsel relevant to its state of mind. *Id.* 4–8; *see also Bonetto v. Allstate Ins. Co.*, No. 3:03-cv-3560, ECF 24 at *4 (D.S.C. July 20, 2004) (observing that, where "information regarding the state court trial only reached [the insurer's agents] after being filtered through their attorney[,] . . . the reasonableness of the claims process necessarily implicates the advice of counsel"); *Howard v. State Farm Mut. Auto Ins. Co.*, 450 S.E.2d 582, 584 (S.C. 1994) ("Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim . . . .") (citation omitted).

In the present case, Defendant "retained Garcia to provide legal advice on insurance coverage matters, . . . includ[ing] responding to correspondence from coverage counsel for the Creekstone entities raising questions as to coverage matters." (Dkt. No. 56 at 1–2.) It is unclear when Garcia was first retained by Defendant— Defendant maintains that it was "much later" than October 1, 2012, the beginning date of Plaintiffs' subpoena. (*Id.* at 3.) Defendant decided on April 10, 2014, to deny coverage. (Dkt. No. 70 at 8.) Defendant has asserted as an affirmative defense that it "had a reasonable basis for" its decision to deny coverage. (Dkt. No. 28 ¶ 93.) On this evidence, the Court finds that Defendant has failed to establish a lack of waiver of the attorney-client privilege for at least part of the time period to which the subpoena applies. *Hege*, 2011 WL 1791883, at *4.

Because Defendant denied coverage on April 10, 2014, the waiver of the attorney-client privilege would only apply to prior to this date. *Howard*, 450 S.E.2d at 584 ("Evidence that arises after the denial of the [insurance] claim is not relevant to the propriety of the conduct of

the insurer at the time of its refusal."). Plaintiffs state that they chose October 2012 for the subpoena because Defendant "first responded to [the] notice of the Underlying Lawsuit in October 2012." (Dkt. No. 70 at 10.) Accordingly, the attorney client-privilege would not apply to Garcia's files from October 2012 to April 10, 2014.

2. Work Product Privilege

The work-product doctrine only applies to documents prepared "in anticipation of litigation." *Nat'l Union*, 967 F.2d at 984. "The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." *Id.* Generally, an insurer's investigation into whether coverage exists is taken in the ordinary course of business and therefore is not covered by the work-product doctrine. *See Gilliard v. Great Lakes Reinsurance (U.K.) PLC*, No. 2:12-cv-867-DCN, 2013 WL 1729509, at *2 (D.S.C. Apr. 22, 2013) (collecting cases). Further, work-product is discoverable where there is substantial need for it and no other way to obtain its equivalent. Fed. R. Civ. P. 26(b)(3).

Here, Defendant asserts that "once coverage litigation was anticipated," the work-product privilege would apply to Garcia's files. (Dkt. No. 56 at 3.) Plaintiffs, however, have presented evidence that many of the documents asserted to be work-product may be discoverable. First, the documents prepared by Garcia to aid Defendant's coverage determination are likely not prepared in "anticipation of litigation." Further, because the insurer's thoughts and knowledge are central to Plaintiffs' bad faith claim, these documents are likely to be the only method by which Plaintiffs may prove their claim. *See Bonetto*, ECF 24 at *7–8 (holding that the work product privilege did not apply because the defendant-insurer "ha[d] not established that the entire claim file was compiled in anticipation of litigation" and, even if it were, the exception

contained in Rule 26(b)(3) applied because plaintiff had "a substantial need for the material and the material [wa]s not otherwise available to her").

Based on the reasoning above, the Court concludes that the work product privilege does not apply to Garcia's files relating to coverage matters prior to Defendant's decision to deny coverage. Accordingly, the work product privilege would not apply to Garcia's files relating to coverage matters from October 2012 to April 10, 2014.

3. Non-Privileged Documents

As for the documents that Defendant recognizes are not privileged, Defendant asserts that Plaintiffs "cannot explain how the non-privileged information sought is uniquely within the knowledge of Crum & Forster's counsel" or "how this information is crucial to the case." (Dkt. No. 56 at 4.) Based on these arguments, Defendant has failed to establish undue burden or expense as a result of the subpoena. Fed. R. Civ. P. 26(c). In addition, Plaintiffs need not demonstrate that the sought information is "crucial," only that it is relevant. Fed. R. Civ. P. 26(b)(1). Accordingly, the Court cannot grant Defendant's motion to quash and motion for protective order on these grounds.

B. Motion to Exclude and Protect Privileged Communications

Defendant asserts that the correspondence labeled C&F 001863-001865 is subject to attorney-client privilege and the work-product doctrine. (Dkt. No. 44 at 3.) The correspondence, dated July 23, 2013 through August 1, 2013, "shows a series of emails between [Defendant] and its former coverage counsel, Gary S. Kull (Kull), . . . regarding a coverage question, request for legal analysis, and counsel's corresponding response." (*Id.*)

For the same reasons that Garcia's files are not fully protected by attorney-client privilege and the work-product privilege, the Court finds that the correspondence at issue here is

not privileged. The information contained in documents C&F 001863-001865 reflects Kull's legal advice to Defendant on coverage matters, provided prior to Defendant's decision to deny coverage. (Dkt. No. 44 at 3.) Defendant has asserted as an affirmative defense that it "had a reasonable basis for" its decision to deny coverage. (Dkt. No. 28 ¶ 93.) Accordingly, the Court concludes that the attorney-client privilege and the work-product privilege do not apply to this correspondence, and, therefore, there is no basis to exclude it. *See, e.g.*, *Myrtle Beach*, 2010 WL 3420044 at *4–8; *Bonetto*, ECF 24 at *7–8; *Howard*, 450 S.E.2d at 584.

III. CONCLUSION

For the reasons set forth above, the Court **DENIES IN PART** and **GRANTS IN PART** the motion to quash and **DENIES** the motion for protective order. (Dkt. No. 56.) Within 15 days of this Order, Defendant is directed to produce to Plaintiff any of Garcia's files relating to coverage matters from October 1, 2012 to April 10, 2014. In addition, within 15 days of this Order, Defendant is directed to produce any non-privileged documents in Garcia's files that are subject to the subpoena. The Court further **DENIES** Defendant's motion to exclude and protect privileged communications. (Dkt. No. 44.) Correspondence C&F 001863-001865 therefore remains part of discovery.

IT IS SO ORDERED.

Richard M. Gergel
United States District Judge

June 3, 2015
Charleston, South Carolina