

(Cite as: 1998 WL 908950 (Bankr.D.Vt.))

In re Annette LYNCH, Debtor.

Raymond J OBUCHOWSKI, Esq., Trustee for the Estate of Annette Lynch Plaintiff.

v.

PHICO INSURANCE CO. Defendant.

Nos. 97-10381, 97-1084.

United States Bankruptcy Court. D. Vermont.

Dec. 17, 1998.

L. Chalidze, and J.P. Faignant, of Miller Faignant & Whelton, PC, Rutland, VT, for Chapter 7 Trustee ("Trustee").

S. Hart, and P. Saxer, of Saxer Anderson Wolinsky & Sunshine, PC, Burlington, VT, for Phico Insurance Company ("Phico").

**MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO ENFORCE SUBPOENA AND
DEFENDANT'S MOTION FOR IMPOSITION OF A PROTECTIVE ORDER**

CONRAD, Bankruptcy J.

*** 1** We must determine [FN1] whether a liability insurer can shield litigation files regarding state court actions from Trustee, even after its insured, the defendant in the state court actions, explicitly waived any privileges and authorized Trustee to review the files. We hold that the privilege has been waived, and order production of the materials.

FN1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334 (b) and the General Reference to the Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 U.S.C. § 157(b)(2)(A) and (E). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bkcty.P. 7052.

FACTUAL HISTORY

Debtor, a psychologist, filed a Chapter 7 petition on March 3, 1997. Eleven former patients brought medical malpractice actions against Debtor in State court. Phico was Debtor's medical malpractice insurer. After Debtor signed nonwaiver agreements, [FN2] Phico hired Attorney Ritchie Berger ("Berger") to defend Debtor in the malpractice actions. Trustee brought this declaratory judgment action to determine the rights and liabilities of the parties under the medical liability insurance policy issued by Phico. [FN3]

FN2. We held that ten of the eleven nonwaiver agreements signed by Debtor were invalid on their face because they did not cite any specific defenses to coverage retained by Phico. See *Obuchowski v. Phico Ins. Co.*, ---BR-- (Bankr.D.Vt.1998). 1998 WL 799815 (October 16.1998). The remaining agreement retained specific defenses to coverage and was held to be a valid reservation of Phico's rights. *Id.*

FN3. Trustee claims the central issues in this declaratory judgment action are whether the malpractice policies cover Debtor, whether Phico waived any defenses to coverage, and whether Phico acted in good faith while handling the malpractice claims. (See Joint Pre-Trial Statement at 1).

During discovery, Trustee sought Berger's files regarding his defense of the malpractice actions, and any correspondence between Berger and Phico. Although Debtor waived its attorney-client privilege [FN4] and explicitly authorized Trustee to review the files, Berger refused production based on Phico's alleged attorney-client privilege and on the work product doctrine. Trustee then filed this Motion to Enforce Subpoena, seeking production of the litigation files and any relevant documentation held by Phico.

FN4. Trustee originally claimed the power to waive Debtor's attorney- client privilege, and we reserved our decision on whether or not Trustee had such a power. On September 30, 1998, a few days before this Court issued its ruling, Debtor voluntarily waived the privilege, rendering that issue moot. (Confidentiality Agreement at 1).

ATTORNEY-CLIENT PRIVILEGE

Phico claims that as a client of Berger, its communications with Berger are entitled to the attorney client privilege. According to Phico, Debtor's waiver of its own privilege has no effect on the vitality of Phico's privilege with Berger. In essence, Phico sees its privilege as existing in its own realm, distinct, unrelated, and ultimately unaffected by Debtor's waiver.

"The attorney-client privilege protects '(c)onfidential disclosures by a client to an attorney made in order to obtain legal assistance.'" *Vermont Gas Sys., Inc., v. United States Fidelity & Guar.*, 151 F.R.D. 268, 274 (D.Vt.1993) (quoting *In re Grand Jury Subpoenas*. 959 F.2d 1158,

1165 (2d Cir.1992). Vermont law [FN5] limits the privilege to confidential communications between the client and his [her] attorney or representatives. *Id.* at 274-275. "The burden is on the party invoking the protection of the attorney-client privilege to establish those facts that are the elements of the privileged relationship." *Id.* at 275.

FN5. We apply Vermont's law of privilege under the Federal Rules of Evidence. "(I)n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness ... (or) ... person ... shall be determined in accordance with State law." Fed.R.Evid. 501.

The status of the insurer as a client of defense counsel has long troubled both commentators and courts. "The relationship between an insurer, insured, and counsel retained for the insured by the insurer is confusing at best." *In re Vincent Illuzzi*, 160 Vt. 474, 492, 632 A.2d 346, 355 (1993) (Allen, J., dissenting). The relationship troubles us also. We accept the view, however, that insurers are sometimes entitled to client status under the tripartite relationship between the insurer, the insured, and counsel. "(T)he insurer and insured usually have a shared interest to successfully resist or settle a claim. This common interest permits the retained lawyer to represent ethically both insurer and the insured in litigation." *Id.*; also see *Vermont Gas Sys., Inc.*, 151 F.R.D. at 277 (noting that in general, Common Interest doctrine gives insured rights regarding attorney-client privilege with respect to counsel shared with insured.)

***2** When two clients with a common interest share counsel in the same litigation, the Common Interest doctrine limits the application of the attorney-client privilege. See *Vermont Gas Sys., Inc.*, 151 F .R.D. at 277. As recognized by the Vermont Rules of Evidence, the doctrine invalidates privilege claims made by one joint-client against another. V.R.Evid. 502. [FN6] Further, "(it is) clear that use of the (Common Interest) doctrine is warranted when there is a dispute between insurer and insured regarding underlying litigation in which the insured was represented by an attorney appointed by the insurer." *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 69 (D.N.J.1992); see also Charles C. Marvel, Annotation, *Applicability of Attorney-Client Privilege To Evidence Or Testimony In Subsequent Action Between Parties Originally Represented Contemporaneously By Same Attorney, With Reference To Communication To Or From One Party*, 4 A.L.R. 4th 765 § 5 (1981) (discussing numerous cases applying the joint-client exception to an insurance company's claimed attorney-client privilege against its insured).

FN6. V.R.Evid. 502 states:

(d) Exceptions. There is no privilege under this rule:

(5) Joint Clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them

to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Although Phico may be able to assert its privilege in these files against third parties, it cannot do so against Debtor. Phico correctly states that the interests of Trustee and Phico are presently adverse. The litigation files and correspondence, however, were generated in preparation for and during the State court actions, and at that time Phico and Debtor closely shared the common interest of minimizing Debtor's liability. [FN7] As such, they were joint clients, and any relevant communications or files held by Berger regarding his defense of those malpractice actions are not privileged as to Debtor. See *Shapiro v. Allstate Ins. Co.*, 44 F.R.D. 429, 431 (E.D.Pa.1968); "Counsel represents both, ... (the insurer and the insured) ... there can be no privilege on the part of the (insurance) company to require the lawyer to withhold information from his other client, the policy-holder"; *Vermont Gas Sys., Inc.*, 151 F.R.D. at 277 ("communications between an insured and its attorney connected with the defense of an underlying litigation are normally not privileged vis-a-vis the insured's carriers in subsequent litigation.") (quoting *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.* 654 F.Supp. 1334, 1365 (D.D.C.1986)); V.R.Evid. 502.

FN7. Phico argues that the joint defense theory does not apply, because there is a duality of interest rather than a common interest. "I don't know why there's a joint defense notion. We have a duality of interest--that's another phrase that would describe the relationship between the insurance company and the insured. For example, both the insured and the insurance company have a dual interest in winning the case, as they're settling them as cheaply as possible, but that has nothing to do with the common interest doctrine that I know of." (Hearing on Motion by Plaintiff Raymond Obuchowski to Enforce Subpoena and Certification of Good Faith Efforts to Resolve Discovery Dispute; Tr. at 4-5, Nov. 19, 1998). Contrary to Phico's assertion, this "dual" interest of Debtor and Phico in winning the case is the precise reason that the Common Interest doctrine applies. See *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 69 (D.N.J.1992); *Marvel. Applicability of Attorney-Client Privilege*, 4 A.L.R. 4th 765 § 5 (1981); Cf. *Vermont Gas Sys., Inc.*, 151 F.R.D. at 277 (holding that where there is an adversarial relationship between insured and insurer as to existence of coverage, the parties never shared litigation counsel or strategy, and documents at issue were prepared in an atmosphere of uncertainty as to the scope of any identity of interest shared by the partes, common interest did not exist). Phico has not claimed, and we do not find, that the circumstances noted above in *Vermont Gas* are analogous to this case.

In this case, Trustee inherited all rights of the Debtor as property of the estate under § 541 of the Bankruptcy Code, [FN8] and Debtor explicitly waived its privilege and authorized Trustee to examine the files for the purposes of this litigation. We therefore find that Phico cannot assert an attorney-client privilege over the materials in this matter. See *Catino v. Travelers Ins. Co.*, 136 F.R.D. 534 (D.Mass.1991) (holding that there was no attorney-client

privilege between insurance company and attorney hired by company to represent insured as against insured's assignee).

FN8. The bankruptcy estate is defined as containing, with some exceptions not applicable here, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

ATTORNEY WORK PRODUCT

***3** Either the lawyer or the client may assert a privilege under the attorney work product doctrine. Vermont Gas Sys., Inc., 151 F.R.D. at 275. The doctrine protects disclosure of materials prepared by an attorney or party in preparation for litigation. Fed.R.Civ.P. 26(b)(3). [FN9] Phico claims that the documents sought are protected as work product, and also notes that because the files sought by Trustee contain Phico claim handlers' mental impressions, thoughts, opinions, conclusions, and theories of the case, they are "absolutely protected from disclosure" under Rule 26(b)(3).

FN9. Fed.R.Civ.P. 26(b)(3) states:

Trial Preparation: Materialsa party may obtain discovery of ... (work product) ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party 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.

While the language of the Rule seems to absolutely bar forced disclosure of opinions and the like, courts in the Second Circuit have often refuted such an interpretation. See *Harris v. United States*, 1998 WL 26187 (S.D.N.Y.1998) (discussing differing interpretations of the Rule in the Second Circuit, and holding no absolute bar from revealing mental impressions); 6 James WM Moore et al., *Moore's Federal Practice* § 26.70(5)(e) (3rd ed. 1998) ("The majority of federal courts, however, have followed the better rule that 'opinion work product' is subject to disclosure on a showing of extraordinary circumstances.")

Accordingly, even if the files contain opinions and conclusions as alleged by Phico, we do not think they are completely immune from discovery. Instead, we find Trustee must meet a higher standard under 26(b)(3) in order to compel production. We find Trustee has met this standard by showing a very substantial need for the documents and a complete inability to obtain them by other means. Without these files, Trustee cannot determine whether or not Phico acted in good faith in dealing with Debtor, one of the main goals of this declaratory

action. See *Holmgren v. State Farm Mut. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (allowing discovery of opinion work product in bad faith insurance case because mental impressions and processes of insurer were pivotal issues in the litigation). Under such circumstances, we feel that the heightened test under Rule 26(3)(b) has been met. See *Layton v. Liberty Mut. Fire Ins. Co.*, 98 F.R.D. 457 (E.D.Pa. 1983) (holding that insured had met test to force insurer to disclose work product).

CONCLUSION

In light of the fact that Debtor has waived its privileges in this declaratory action, Phico cannot assert any privileges to the files or correspondence sought by Trustee. Accordingly, Trustee's Motion to Enforce Subpoena is Granted. Phico's Motion For Imposition Of A Protective Order is Denied. Berger shall turn over to Trustee any files regarding his defense of Debtor in the State court malpractice actions, including any correspondence with Phico made during that representation within ten (10) days of entry of the Order. Phico will also turn over any documentation in its possession regarding Berger's defense of the malpractice actions within the same time period. Trustee shall submit an Order consistent with the rulings in this Memorandum within five (5) days of its entry.

1998 WL 908950 (Bankr.D.Vt.)

[Back to Opinions by Citation](#)

[Back to Opinions by Date](#)

OR

[Or Search for Keywords](#)