IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ALEXANDRA SIMS PLAINTIFF

v. No. 4:13CV00371 JLH

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY DEFENDANT

OPINION AND ORDER

Alexandra Sims brought claims against State Farm Mutual Automobile Insurance Company for breach of contract, bad faith, and violation of the Arkansas Deceptive Trade Practices Act. Sims has filed a motion to compel and to extend the expert disclosure and discovery deadlines.

The complaint alleges that Sims suffered serious and permanent injuries in an automobile accident caused by an underinsured motorist. Sims had underinsured motorist insurance coverage with State Farm. Sims, with State Farm's blessing, settled her claim against the underinsured motorist. State Farm then refused to pay to Sims the underinsured motorist limits as she requested.

Sims has moved to compel State Farm's answers to interrogatories and production of materials. Many of the numerous requests made by Sims and to which State Farm objects involve a disagreement over whether State Farm's institutional practices for handling claims are relevant to this action. Sims argues that these practices are relevant to her bad-faith claim. State Farm argues that the issues in this action are narrow and that institutional practices are not relevant to how State Farm handled Sims's claim.

"[I]n a suit based on diversity of citizenship jurisdiction the federal courts apply federal law as to matters of procedure but the substantive law of the relevant state." *In re Baycol Prods. Litig.*, 616 F.3d 778, 785 (8th Cir. 2010) (quoting *Hiatt v. Mazda Motor Corp.*, 75 F.3d 1252, 1255 (8th Cir. 1996)). In Arkansas, "to state a claim for bad faith, one must allege that the defendant insurance

company engaged in affirmative misconduct that was dishonest, malicious, or oppressive." *Unum Life Ins. Co. of Am. v. Edwards*, 362 Ark. 624, 627-28, 210 S.W.3d 84, 87 (2005). This actual malice state of mind "may be inferred from conduct and surrounding circumstances." *Aetna Cas. & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 134, 664 S.W.2d 463, 465 (1984).[1]

Sims argues that State Farm employed a strategy of intentionally underpaying claims to increase profits and that this strategy influenced the way in which State Farm assessed Sims's claim. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Relevancy is broadly construed "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 23289, 57 L. Ed. 2d 253 (1978). A court must limit the frequency or extent of discovery if "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(iii). The party resisting a discovery request has the burden of establishing that a court should limit relevant discovery. *Clark v. Baka*, No. 4:07-CV-00477 GTE, 2008 WL 4531708, at *2 (E.D. Ark. Oct. 9, 2008).

Documents that relate to State Farm's strategy of paying claims are relevant to whether State Farm underpaid Sims, to whether State Farm purposefully underpaid Sims, to whether State Farm was dishonest, malicious, or oppressive in its reasons for possibly underpaying Sims, and to the general decision-making processes that State Farm used to evaluate Sims's claim. *See, e.g.*, *Barten*

[1] The parties agree that Arkansas law governs the claims in this action.

v. State Farm Mut. Auto. Ins. Co., No. CIV 12-399-TUC-CKJ (LAB), 2013 WL 4046700, at *2 (D. Ariz. May 31, 2013); *Lillibridge v. Nautilus Ins. Co.*, No. CIV 10-4105-KES, 2013 WL 1896825, at *10 (D.S.D. May 3, 2013); *Akins v. State Farm Mut. Auto. Ins. Co.*, No. 10-CV-12755, 2011 WL 3204839, at *7 (E.D. Mich. July 28, 2011); *Chauvin v. State Farm Mut. Auto. Ins. Co.*, No. 10-CV-11735, 2011 WL 1810625, at *2 (E.D. Mich. May 11, 2011). This does not mean that every State Farm training manual and practice is relevant to this action; the information must have some relation to how the Arkansas office or offices that decided Sims's claim handles or has handled underinsured motorist claims.[2] Information that was used only in other states or regions and did not affect State Farm's practices in Arkansas do not seemingly influence issues in this action. *See State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22, 123 S. Ct. 1513, 1522, 155 L. Ed. 2d 585 (2003).

Requests for Production 16-18, 30, 46, 57-58, 61, 76, 79, 106, 122, and 124[3] seek information relating to how State Farm handles claims. For the reasons stated above, to the extent that these requests seek information related to the handling of underinsured motorist claims in Arkansas, the requests are reasonably calculated to lead to the discovery of evidence related to how State Farm handled Sims's claim. State Farm argues that some of the claims-handling materials requested had ceased being used as training manuals or materials by the time Sims's accident occurred. *See, e.g.*, Document #22-1 at 19 (State Farm's Response to Request for Production 16) ("Material on which individuals were trained prior to the date of loss which was obsolete prior to

[2] Training manuals used by State Farm throughout the nation, including Arkansas, regarding claims-handling in general, including underinsured motorist claims, would meet this test of discoverability; manuals used only in another region or that relate only to some other type of claim would not.

[3] State Farm produced documents responsive to several of these requests, but it did so "subject to and without waiving" a litany of objections, so it is impossible to ascertain from the discovery responses whether the production has been complete.

the date of loss is neither material nor relevant to the coverages and matters at issue in this case."). Those materials still are reasonably calculated to lead to the discovery of admissible evidence. Sims argues, and other courts have found, that while the names of different training programs and manuals have changed, the strategies put in place by those programs continue to influence the ways in which State Farm handles claims. *See Barten*, 2013 WL 4046700, at *2 ("It appears that the ACE assessment approach continues to influence State Farm's corporate culture. And, this culture is relevant to the handling of Barten's claims."); *Akins*, 2011 WL 3204839, at *7. State Farm must produce the requested claims-handling materials that relate to the handling of underinsured motorist claims in Arkansas even if those materials had ceased being used when Sims's accident occurred.

State Farm also argues that Request for Production 76 is not relevant because State Farm's Total Evaluation and Claim Handling courses were "initially" designed as courses about third-party injury claims, not first-party claims such as this action. Document #29-4 at 2. State Farm explains that the T.E.A.C.H. courses are not "geared" toward the handling of first-party claims. *Id.* The uses of "initially" and "geared" leave open the possibility that the T.E.A.C.H. courses affected how employees handled first-party claims, even though the T.E.A.C.H. courses were focused on third-party claims. Those materials could therefore lead to the discovery of admissible evidence and should be produced.

State Farm also argues that Sims has requested specific documents that State Farm is unable to locate. State Farm does not have to produce documents that are not in its possession, custody, or control. Fed. R. Civ. P. 34(a)(1); *see Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1075 (D. Minn. 2009).

Requests for Production 22, 33, 38-39, 85-87, and 132 seek information regarding employee bonus compensation and employee evaluations. Sims argues that State Farm has adopted strategies

that reward claims personnel for underpaying claims. *See Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, 995 P.2d 276, 279 (2000) ("At trial, Zilisch produced evidence that State Farm engaged in a deliberate practice of underpaying claims nationwide. The evidence suggested State Farm set arbitrary claim payment goals for its claims personnel in order to reach the company goal of having the most profitable claims service in the industry. Promotions and salary increases for State Farm claims personnel were based on reaching these goals."). Compensation information is relevant to bad-faith claims, because it "may reveal whether a particular employee was rewarded financially for denying a certain number or percentage of claims or achieving a particular outcome with regard to claims handling." *Anspach v. United of Omaha Life Ins. Co.*, Civ. No. 10-5080-JLV, 2011 WL 3862267, at *9 (D.S.D. Aug. 31, 2011); *see Burke v. Ability Ins. Co.*, 291 F.R.D. 343, 353 (D.S.D. 2013); *Lillibridge v. Nautilus Ins. Co.*, 2013 WL 1896825, at *11 ("The court finds that this information is relevant because monetary incentives could establish company and employee motives for how Nautilus investigates or handles claims with its policyholders and could lead to other facts that could bear upon a . . . bad faith determination."). As with other discoverable material in this action, however, the information is relevant only if it has a relationship to Sims's insurance claim. For compensation or evaluation information of individual employees to be reasonably calculated to lead to the discovery of admissible evidence, the employee must be someone who made a decision on how to handle Sims's claim or someone who supervised a person who made a decision on how to handle Sims's claim. This would include persons with supervisory authority over the handling of underinsured motorist claims in the State of Arkansas.

Some of Sims's requests are not limited to this information. Request for Production 22, for example, seeks copies of "any and all documents relating to bonus compensation to officers, directors, managers, supervisors[,] and other personnel for the period beginning five (5) years before

the Plaintiff's claim for UIM benefits in this case to the present." Document #22-1 at 23. To the extent that this request includes bonus-compensation information for employees who did not handle the claim and have nothing to do with supervision over underinsured motorist claims in Arkansas, it is not discoverable. *See Kirschenman v. Auto-Owners Ins.*, 280 F.R.D. 474, 483 (D.S.D. 2012). The same principle should also limit what State Farm must produce under Requests for Production 86 and 87.

Request for Production 33 seeks information regarding employees' participation in thrift programs. This information is irrelevant to Sims's claims and need not be produced.

State Farm also expresses concern over the production of confidential, proprietary business information pertaining to employees who have expectations that State Farm will protect their privacy. This may provide a valid reason for a protective order, but it is not a sufficient reason for denying the requests for production altogether. *See, e.g., Signature Dev., LLC v. Mid-Continent Cas. Co.*, No. CIV 11-5019-JLV, 2012 WL 4321322, at *13 (D.S.D. Sept. 18, 2012); *Duling v. Gristede's Operating Corp.*, 266 F.R.D. 66, 73 (S.D.N.Y. 2010) (citing a multitude of cases granting protective orders to address privacy concerns of employees' personnel files).

Requests for Production 44, 51, 52-54, 89, 103, 126, and 129-130 seek information regarding State Farm's financial condition from the year 2001 to the present. Individual employee compensation is relevant to Sims's bad-faith claim because it can show whether an employee was rewarded for achieving particular outcomes regarding claims. Similar documents are not needed, however, to show that an insurance company has a financial incentive to deny a claim: obviously, it does. *Cf. Weese v. Nationwide Ins. Co.*, 879 F.2d 115, 118 (4th Cir. 1989) ("Nationwide fails to recognize that all first party claims are adversarial. The insurer wishes to minimize payment and the insured wishes to maximize it.").

Requests for Production 40, 71-72, 96, and 134-136 seek materials related to State Farm's Achieving Claims Excellence program and to other programs that implemented claims-handing strategies. State Farm argues that these documents are irrelevant because the Achieving Claims Excellence program ended in approximately 1998. Sims argues that the Achieving Claims Excellence program was the program that began State Farm's strategy of forcing claims into litigation. Courts have found that the Achieving Claims Excellence program continues to influence State Farm's corporate culture, which is relevant to the handling of Sims's insurance claim. *See Barten*, 2013 WL 4046700, at *2. These materials are relevant or reasonably calculated to lead to the discovery of admissible evidence if, as with the other requests dealing with claims-handling materials, they have a relation to the handling of underinsured motorist claims in Arkansas. This applies to programs that dealt with claims handling after the Achieving Claims Excellence program ended. State Farm argues that its State Farm 2000 program includes multiple initiatives not related to claims handling and that it cannot determine the scope of all documents that could possibly relate to the program. State Farm does not have to produce materials that are part of the State Farm 2000 program that do not relate to the underinsured motorist claims-handling processes or procedures because no indication exists that producing those materials will lead to the discovery of admissible evidence.

Requests for Production 121 and 137 seek State Farm's document-retention guidelines. State Farm argues that this information is not relevant. Sims argues that documents existed in other litigation that State Farm says do not exist now. Evidence in prior actions indicated that

> State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, efforts that directly affected the [plaintiffs]. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was changed." Yet in discovery proceedings, State Farm failed to produce

> any claim-handling practice manuals for the years relevant to the [plaintiffs'] bad-faith case.

Campbell, 538 U.S. at 434, 123 S. Ct. at 1529 (Ginsburg, J., dissenting). State Farm's document-retention guidelines are relevant to how and why documents that existed in previous litigation no longer exist and to whether State Farm made efforts to destroy documents that might reveal claim-handling actions taken in bad faith.

Interrogatory 11 seeks information regarding disagreements or reprimands over the way in which Sims's claim was handled. It asks State Farm to describe disagreements regarding the proper level of payout for Sims's claim. State Farm responded that Team Manager Oscar Rodriguez had a difference of opinion regarding Claim Representative Dean Ripley's evaluation of the value of Sims's claim. In its response to Sims's motion to compel, State Farm asserted that Sims will have the opportunity to depose Rodriguez and Ripley about this issue. If this is the only disagreement that occurred, then it seems as though State Farm has complied and Sims will be able to obtain the information that she requests.

Interrogatory 12 asks whether any of State Farm's adjusters or their supervisors have been disciplined for failing to meet standards relating to claim payouts. For the same reasons that State Farm's training procedures are relevant, this interrogatory asks for relevant information, to the extent that the adjusters or their supervisors were involved in handling Sims's claim or supervised those who were involved. This also limits the interrogatory to information that is not unduly burdensome for State Farm to obtain. While State Farm has partially complied with this interrogatory, it may have more information to provide.

Request for Production number 24 provides, "Produce all performance evaluations of the claims representative, claims manager, and other individuals having any involvement whatsoever

in handling the claim in this matter." As with incentive compensation, performance evaluations are relevant to the ways in which employees at State Farm handle claims in general and handled Sims's claim in particular. *See Burke*, 291 F.R.D. at 252-53. This request is limited to personnel involved in handling Sims's claim, so it is not overly broad or unduly burdensome.

Request for Production 5 seeks a history of Sims's payments to State Farm. State Farm initially objected to the request but now states that it will comply. *See* Document #30 at 19.

Requests for Production 13-14 and 55-56 seek State Farm's entire file on Sims's claim. State Farm has produced some materials in response but objects to producing more because, it argues, the requests seek information and documents protected by the attorney-client privilege and the work-product doctrine. In a diversity action such as this, courts apply federal law to resolve work-product issues and state law to resolve attorney-client privilege issues. *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000); *see* Fed. R. Evid. 501. The work-product doctrine protects documents prepared in anticipation of litigation. *See Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987).

> The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

Id. (quoting 8C Wright & Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970)). The issue is not exclusively one of timing, that is, it is not exclusively when litigation was first anticipated. The inquiry is whether the materials requested were prepared in the ordinary course of business or in anticipation of litigation. If they were prepared in anticipation of litigation, then the work-product doctrine covers them. If, on the other hand, they were prepared in the ordinary course

of business, even if litigation was expected or was ongoing, then they are discoverable. As the Southern District of Indiana has explained:

> An insured seeking documents and reports in his insurer's claims file presents a special problem for application of the work product rule because it is the very nature of an insurer's business to investigate and evaluate the merits of claims. Reports and documents produced for this purpose will likely be relevant to later litigation over a claim as well. This complication affects both the causation and reasonable anticipation components of the work product analysis. Most courts have held that documents constituting any part of a factual inquiry into or evaluation of a claim, undertaken in order to arrive at a claim decision, are produced in the ordinary course of an insurer's business and not work product.

Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 662 (S.D. Ind. 1991). Thus:

> [Federal Rule of Civil Procedure] 26(b)(3) requires that a document or thing produced or used by an insurer to evaluate an insured's claim in order to arrive at a claims decision in the ordinary and regular course of business is not work product regardless of the fact that it was produced after litigation was reasonably anticipated. It is presumed that a document or thing prepared before a final decision was reached on an insured's claim, and which constitutes part of the factual inquiry into or evaluation of that claim, was prepared in the ordinary and routine course of the insurer's business of claim determination and is not work product. Likewise, anticipation of litigation is presumed unreasonable under the Rule before a final decision is reached on the claim. The converse, of course, is presumed for documents produced after claims denial. To overcome these presumptions, the insurer must demonstrate, by specific evidentiary proof of objective facts, that a reasonable anticipation of litigation existed when the document was produced, and that the document was prepared and used solely to prepare for that litigation, and not to arrive at a (or buttress a tentative) claim decision.

Id. at 663-64; *see also Weitzman v. Blazing Pedals, Inc.*, 151 F.R.D. 125, 126 (D. Colo. 1993) ("While claim files generated in relation to first party claims are made in the ordinary course of business and are discoverable, files generated during the investigation of third party claims are made in anticipation of litigation and are not discoverable.").

Here, the Court cannot determine from reviewing the responses to the requests for production whether State Farm has produced all of the documents that were prepared in the ordinary course of business. The Court will presume that because this claim is a first-party claim documents in the

claims file were prepared in the ordinary course of business, not in preparation for litigation, so the burden will be on State Farm to show to the contrary.

The attorney-client privilege protects certain confidential communications made to facilitate the rendering of professional legal services to the client. *See* Ark. R. Evid. 502; *Holt v. McCastlain*, 357 Ark. 455, 463-64, 182 S.W.3d 112, 117-18 (2004) ("The purpose of the attorney-client privilege is to promote 'full and frank communication' between attorneys and clients, and that, in turn, promotes the observance of law and administration of justice." (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981))). "The burden of proving that the privilege applies is upon the party asserting it . . . ." *Shankle v. State*, 309 Ark. 40, 47, 827 S.W.2d 642, 646 (1992). State Farm asserts that it produced a privilege log identifying the materials withheld on the grounds that they were protected by the attorney-client privilege.

State Farm must produce materials under requests for production 13-14 and 55-56 that are not subject to the work-product doctrine and the attorney-client privilege, as explicated above. If any materials are withheld, State Farm must describe the nature of the materials not produced or disclosed and do so in a manner that, without revealing privileged or protected information, will enable Sims to assess that assertion. Fed. R. Civ. P. 26(b)(5)(A)(ii); *see Impact, LLC v. United Rentals, Inc.*, No. 4:08CV00430 JLH, 2009 WL 413713, at *6 (E.D. Ark. Feb. 18, 2009). If Sims believes that State Farm is withholding materials regarding Sims's claim file that are not subject to the work-product doctrine and the attorney-client privilege, Sims may file another motion to compel those materials.

CONCLUSION

Sims's motion to compel is granted in part and denied in part. Document #22.

The motion to compel is granted as to Requests for Production 16-18, 30, 46, 57-58, 61, 76, 79, 106, 122, and 124 to the extent that these requests seek information related to the handling of underinsured motorist claims in Arkansas. Otherwise, it is denied as to these requests.

The motion to compel is granted as to Requests for Production 22, 33, 38-39, 85-87, and 132 to the extent that these requests seek information regarding compensation paid to and evaluations of employees who made a decision regarding handle Sims's claim or who have some supervisory authority over the handling of underinsured motorist claims in Arkansas. Otherwise, as to these requests, the motion is denied. The motion to compel is denied as to the portion of Request for Production 33 that seeks information regarding employees' participation in thrift programs.

The motion to compel is denied as to Requests for Production 44, 51, 52-54, 89, 103, 126, and 129-130.

The motion to compel is granted as to Requests for Production 40, 71-72, 96, and 134-136 to the extent that they relate to the handling of underinsured motorist claims in Arkansas; otherwise, it is denied as to these requests.

The motion to compel is granted as to Requests for Production 121 and 137.

The motion to compel is granted in part as to Interrogatories 11 and 12 and Request for Production 24. State Farm seems to have complied with Interrogatory 11 and partially with Interrogatory 12, but it may have more information to provide. State Farm must produce the materials requested in Request for Production 24.

The motion to compel is denied as moot as to Request for Production 5 because State Farm has stated that it will comply with this request.

The motion to compel is granted in part as to Requests for Production 13-14 and 55-56. State Farm must produce materials that are not subject to the work-product doctrine or attorney-

client privilege and must provide a privilege log for documents that are withheld as work-product or privileged.

Sims's motion to extend the expert disclosure and discovery deadlines is denied as moot because the Court has continued this action and set aside the current scheduling order. Document #22.

Sims's motion to quash subpoenas for Troy and Becky Sims's depositions is denied as moot. Document #25.

IT IS SO ORDERED this 30th day of April, 2014.

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE