UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Civil Action No. 18-cv-5587**
v.	)	**Hon. John Z. Lee**
EQUITYBUILD, INC., EQUITYBUILD FINANCE, LLC, JEROME H. COHEN, and SHAUN D. COHEN,	)	**Magistrate Judge Young B. Kim**
Defendants.	)	

RECEIVER'S OPPOSITION TO MOTION FOR PROTECTIVE ORDER

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In their Motion for Protective Order (Dkt. No. 866), certain institutional lender claimants seek to block the discovery of "any communications made after the commencement of this action" between them and the title companies that insured their interests (or anyone acting on behalf of either party). None of the three bases for protection asserted by movants—(1) the attorney-client privilege, (2) the insurer-insured privilege, or (3) the "common defense" privilege—entitles them to the blanket exemption from producing any post-August 15, 2018 communications with their insurers that is sought. Instead, it is the Receiver's position that all responsive non-privileged documents should be produced irrespective of the time period in which they were created.

Movants' motion is grounded on their claim that their title insurance contracts with the insurers provide that "upon written request by the insured, the insurer will defend in litigation where a third party asserts a claim covered by the policy adverse to the insured's interest." (Motion at 5) Movants go on to state that "*a prudent insured* will notify its title insurer of litigation . . . and tender the defense of an adverse claim *as soon as possible* . . . ." (Motion at 6) But movants say nothing about whether or when *they* provided such notice or tendered defense of their claim. Similarly, the movants state that the commencement of this action constitutes litigation that *could* prompt a mortgagee to tender a claim to the title insurer. *Id*. But again movants say nothing about whether or when such a tender was in fact made.

These omissions are significant because, as recently as late February 2020, the institutional lenders' counsel were referencing developments that would be needed in this action in order for them to invoke insurance coverage and cause coverage counsel to become involved on their behalf, raising a question about the extent to which such communications would have been privileged before coverage counsel ultimately became involved and appeared on their behalf in the Spring of 2020. Under these circumstances, any communications between business personnel during the

approximately eighteen months prior to a defense being provided would not necessarily be privileged and shielded from discovery.

Thus, the suggestion that, starting precisely on the date the SEC's complaint was filed, every communication between the lenders and their title insurers necessarily involved attorney client and/or work product communications or other privileged communications is unwarranted and unsupported. It would not be surprising for there to have been many non-privileged business communications regarding the loans at issue here, which is precisely the reason that claims of privilege must be asserted individually. As discussed below, even communications regarding coverage and this case would not necessarily be privileged and all non-privileged documents should be produced.

The Insurer-Insured Privilege Does Not Warrant The Relief Sought

Illinois recognizes an insurer-insured privilege. The basis of the privilege is that when an insured communicates with its insurer who is under a duty to defend, "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." *People v. Ryan*, 30 Ill. 2d 456, 461 (1964).

As an initial matter, the insurer-insured privilege is inapplicable in a federal case of this nature. A number of federal courts have refused to recognize the insurer-insured privilege. *See, e.g., Tate & Lyle Americas, LLC, v. Glatt Air Techniques, Inc*., No. 13-cv-2037, 2015 WL 4647561, at *3 (C.D. Ill. July 31, 2015) (*citing Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp*., 5 F.3d 1508, 1514 (D.C. Cir. 1993) ("federal courts have never recognized an insured-insurer privilege"); *Schmalz v. Vill. of N. Riverside*, No. 13-cv-8012, 2018 WL 741395, at *4 (N.D. Ill. Feb. 7, 2018) (same)). Thus, the *Tate* court expressly declined to

follow the Illinois Supreme Court case relied upon by movants here, *Ryan*, 30 Ill. 2d 456, stating that because federal courts *do not* recognize the insurer-insured privilege "defendants' arguments for protection under this privilege are therefore rejected and not discussed further." 2015 WL 4647561, at *3. In contrast, federal courts sitting in diversity – a circumstance not present here – have found the applicability of the attorney-client privilege (and, its offshoot, the insurer-insured privilege) is governed by state law. *See, e.g., Phoenix Ins. Co. v. S.M. Wilson & Co.*, No. 20-cv-3063, 2020 WL 3124312, at *3 (C.D. Ill. June 12, 2020).

And, even if applied, the insurer-insured privilege, like all privilege protections, is in derogation of the search for the truth and is therefore construed narrowly. *Square D Co. v. E.I. Elecs., Inc.*, 264 F.R.D. 385, 390 (N.D. Ill. 2009) (quoting *U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997)). *See also Holland v. Schwan's Home Serv., Inc.*, 2013 IL App (5th) 110560, ¶ 195 ("Because it is the privilege, not the duty to disclose, that is the exception, the privilege ought to be strictly confined within its narrowest possible limits."). Particularly in this case, where there is no evidence presented of when movants may have tendered the defense of their claims, and also where movants were represented by their own counsel in these proceedings for a year-and-a-half before counsel for the title companies appeared on their behalf, the movants' privilege claims must be carefully scrutinized.

A party asserting the insurer-insured privilege "must establish its elements on a document-by-document basis." *Surgery Ctr. at 900 N. Michigan Ave., LLC v. Am. Physicians Assurance Corp., Inc.*, 317 F.R.D. 620, 633 n.5 (N.D. Ill. 2016) (rejecting blanket claim of insurer-insured privilege to withhold many documents from discovery without listing on privilege log). Indeed, "in the insurance context, it is particularly important that the party opposing production of the documents, on whom the burden of proof as to privilege rests, demonstrate by specific and

competent evidence that the documents were created in anticipation of litigation." *Weber v. Paduano*, 2003 WL 161340 at *4 (S.D.N.Y. 2003) (granting in part motion seeking documents and investigative reports developed by insured and other materials).

To that end, courts in this district criticize the blanket invocation of the insurer-insured privilege "like a talisman." *Surgery Ctr.*, 317 F.R.D. at 633 n.5. Instead, the privilege applies only when "the insured may properly assume that the communication is made to the insurer for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." *Holland*, 2013 IL App (5th) 110560, ¶ 196 (quoting *Chicago Trust Co. v. Cook County Hospital*, 298 Ill. App. 3d 396, 409 (1st Dist. 1998)).

Movants argue that they should not be required to prepare a privilege log to support specific claims of privilege, but instead they seek a blanket ruling (unfavored by courts) that "all of the communications between the Mortgagees and their title insurers originating after the commencement of this action are privileged." (Motion at 4) Recognizing the burden of preparing a document-by-document privilege log, the Receiver has proposed a compromise where movants need not individually log communications between the movants and their or the title company's lawyers. But it is the Receiver's position that any claims of privilege for communications *between non-lawyers* should be subject to document-by-document evaluation, which is not possible without knowing all of the parties to the communication, as well as the date and subject thereof. The Receiver therefore suggests that if the law cited above which rejects the applicability of the insured-insurer privilege is not applied (and it should be) and the institutional lenders are permitted to claim privilege relative to internal or external exchanges or other documents involving non-attorneys after August 15, 2018, then those records should be identified on a privilege log (by date,

author/recipient, subject matter and privilege asserted) so that any stakeholder can evaluate the propriety of such withholding.

The Documents Movants Seek To Protect Are Not Automatically Privileged

The movants object to the production of two very broad categories of documents: (1) any communications originated after the commencement of this action and (2) any coverage correspondence. (Motion at 3) Neither category warrants the protective order sought.

To be clear, the Receiver is not seeking privileged documents. But documents are not privileged, as the Movants argue here, merely because they were created after the commencement of litigation. Instead, the test of whether a document is prepared "in anticipation of litigation" is "whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Binks Mfg. Co. v. Nat'l Presto Indus., Inc*., 709 F.2d 1109, 1118 (7th Cir. 1983) (quoting 8 Wright & Miller Federal Practice & Procedure, Civil, § 2024).

As for the movants' communications with their title insurers – which may touch upon issues of priority and/or otherwise contain information regarding knowledge of the existence or non-existence of releases of prior secured interests and other information relating to their claims – the Receiver believes that the standard discovery requests properly seek non-privileged communications that are part and parcel of the title company's ordinary business, including those that deal with the issue of coverage. This complex issue has been noted by the courts, which warn against the overprotection of insurance documents since insurance companies perform work in the ordinary course of business, not just for purposes of litigation:

> Thus, courts presented with work product disputes in the insurance context must be careful not to hold that documents are protected from discovery simply because of a party's "ritualistic incantation" that all documents created by insurers are made in preparation for litigation, and mindful of the fact that insurer-authored

> documents are more likely than attorney-authored documents to have been prepared in the ordinary course of business, rather than for litigation purposes. *American Ins. Co. v. Elgot Sales Corp.*, No. 97 Civ. 1327(RLC)(NRM), 1998 WL 647206, at *1 (S.D.N.Y. Sept. 21, 1998) (discussing need for limiting principle to avoid allowing "virtually the entirety of an insurance company's files" to be exempt from discovery). Overprotecting insurance documents would hinder the broad discovery contemplated by the Rules, while doing little to foster uninhibited deliberation concerning insurance claims, since insurers have a duty—as well as business incentive—to carefully investigate every potential claim, whether or not it will likely erupt into litigation. *See, e.g., Fine v. Bellefonte Underwriters Ins. Co.*, 91 F.R.D. 420, 422 (S.D.N.Y.1981).

Weber v. Paduano, 2003 WL 161340 at *4 (S.D.N.Y. Jan. 22, 2003).

An Illinois federal court considered requests similar to the proposed standard discovery requests at issue in this case in an action brought to quash a subpoena seeking, *inter alia*:

> All Documents relating to Your notice of a potential claim or claim with respect to the Project to any liability insurer, and
>
> All Documents consisting of correspondence, including, but not limited to, tender and coverage correspondence to and/or from You and any insurer with respect to the Project.

Phoenix Ins., 2020 WL 3124312 at *2.

In considering the insured's claim that these requests sought privileged documents that were protected from discovery, the court found that the insured "makes no showing that the documents sought by the subpoena concern confidential communications of information to be transmitted to an attorney." *Id.* (finding insured failed to meet burden to show that subpoena should be quashed for seeking privileged or other protected matter).

Similarly, the Illinois Appellate court rejected an argument that the entirety of an insurance claim file contained communications that were made "for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured" in *Holland*, 2013 IL App (5th) 110560, ¶ 197. The court found no evidence that at the time the statements were made anyone anticipated delivering them to an attorney for the purpose of legal advice, but instead were made

for the purpose of administering a claim. *Id.* (claim file not protected under work-product doctrine where nothing in file revealed the theories, mental impressions, or litigation plans of an attorney). These cases instead recognize that insurance companies operate a business which includes addressing coverage issues and administering claims, and such are provided as part of its business, and are simply not privileged. The type of blanket protection sought by the movants is unfavored in the law precisely because it ignores those distinctions.

Not surprisingly, Movants cite no authority in their motion to support their request for a blanket order pursuant to the insurer-insured privilege that would shield all documents created after August 15, 2018, from discovery. Indeed, aside from the Illinois court's 1964 *Ryan* decision discussed above, none of the cases relied upon by the movants even involved a privilege issue. *See Crum & Forster Managers Corp. v. Resolution Tr. Corp*., 156 Ill. 2d 384 (1993); *Sabatino v. First Am. Title Ins. Co*., 308 Ill. App. 3d 819 (2d Dist. 1999); *Perry v. Fid. Nat. Title Ins. Co*., 2015 IL App (2d) 150168; *R.C. Wegman Const. Co. v. Admiral Ins. Co*., 629 F.3d 724 (7th Cir. 2011); *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467 (3d Dist. 1979). Instead, the cases cited at page 6 of the Motion each concerns an insurer's duty to defend, and the cases cited at page 7 each relates to conflicts of interest between an insured and its insurer. As such, this authority lends no support for the protective order sought by movants.

The Common Defense Privilege Does Not Warrant The Relief Sought

The movants' request for the wholesale protection of documents from discovery pursuant to the common-defense privilege is equally unavailing. This is because the "common defense" privilege presumes a communication is privileged in the first place, and finds that the privilege is not waived by disclosure to a third-party with a common legal interest. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc*., 152 F.R.D. 132, 140 (N.D. Ill. 1993). It does not make any communications

between parties who may have a common interest privileged. *Id.*; *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶¶ 28, 93 (common interest exception to the waiver rule is not intended to create new privileges but to avoid the waiver of existing ones). The "burden of demonstrating the existence of a joint defense agreement falls on the person claiming it." *Square D*, 264 F.R.D. at 391.

The "common interest" or "joint defense" doctrine "generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not only to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both." *Evans*, 113 F.3d at 1467. Accordingly, this doctrine may well shield certain communications in this case. This does not mean, however, that every communication between non-lawyers at the lenders or the title companies is protected. *See, e.g., Square D*, 264 F.R.D. at 391 (granting motion to compel communications between defendant and its patent infringement liability insurer). As in this case, "[a]t some point, [insured] may properly claim privilege with respect to certain communications. But the issue must be resolved on a communication-by-communication or document-by-document basis." *Id.*

Notably, the majority of cases relied upon by the movants do not concern insurers and insureds, and are therefore not particularly helpful to the issue before the Court. *See Selby*, 2017 IL App (1st) 151572 (finding joint defense privilege applicable to insurer and its co-defendant counsel); *U.S. v. McPartlin,* 595 F.2d 1321, 1337 (7th Cir. 1979) (defendant in criminal proceeding entitled to assert privilege for communications made to co-defendant's counsel); *IBJ Whitehall Bank & Tr. Co. v. Cory & Associates, Inc*., No. 97-cv-5827, 1999 WL 617842 (N.D. Ill. Aug. 12, 1999) (finding communications between two banks with common interest in litigation may be privileged if (1) one party is seeking confidential information from the other on behalf of an attorney; (2) one party is relaying confidential information to the other on behalf of an attorney; or

(3) the parties are communicating work product that is related to the litigation). And, in the only case cited by movants involving an insurer and its insured, the context was wholly different from this case and as such is simply inapposite to the issue before the Court. *See Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co*., 144 Ill. 2d 178, 193 (1991) (finding that when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties).

If anything, the cases relied upon by movants demonstrate that the scope of their request for protection is overly broad. In *Selby*, 2017 IL App (1st) 151572, for example, the Illinois Appellate Court conducted an extensive analysis of the common defense privilege as a matter of first impression in Illinois, and found that the doctrine protects post-complaint statements made to further the parties' common interest pursuant to a common-interest agreement: (1) by the attorney for one party to the other party's attorney, (2) by one party to the other party's attorney, (3) by one party to its own attorney, if in the presence of the other party's lawyer, and (4) from one party to another, with counsel present. *Selby*, 2017 IL App (1st) 151572, ¶ 105. The *Selby* court expressly did *not* decide, because the issue was not before it, whether client-to-client communications without the presence of counsel are covered by the common interest exception to the waiver rule. *Id.* ¶ 98. And the court made clear that complete protection of the type sought by the movants here was unwarranted—even for communications involving counsel—because the applicability of the exception depends on "the substance of the statements, who said them to whom, and who else was present when the statements were made." *Id.* ¶ 112. Accordingly, the appellate court found that remand was required for the trial court to conduct an *in camera* communication-by-communication analysis to ensure that only protected communications were withheld from disclosure. *Id.* ¶ 110, 129. *See also IBJ Whitehall Bank*, 1999 WL 617842 at *2, 7 (party asserting privilege has the

burden of establishing each element of the privilege on a document-by-document basis, and finding that "plaintiff has failed to establish that the majority of the communications in the documents are attorney-client or work product information").

Conclusion

Accordingly, for all the foregoing reasons, this Court should deny the Motion for Protective Order (Dkt. No. 866) and require non-privileged documents to be produced irrespective of time period, and if such are withheld, that movants assert claims of privilege on a document-by-document basis.

Dated: November 24, 2020

Kevin B. Duff, Receiver

By: /s/ Michael Rachlis

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I electronically filed the foregoing **Receiver's Opposition To Motion For Protective Order** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. A copy of the foregoing was served upon counsel of record via the CM/ECF system.

I further certify that I caused a true and correct copy of the foregoing **Opposition**, to be served upon the following individuals or entities by electronic mail:

- Defendant Jerome Cohen (jerryc@reagan.com);
- All known EquityBuild investors; and
- All known individuals or entities that submitted a proof of claim in this action (sent to the e-mail address each claimant provided on the claim form).

I further certify that the **Opposition** will be posted to the Receivership webpage at: http://rdaplaw.net/receivership-for-equitybuild

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