

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 2299

HARCO NATIONAL INSURANCE
COMPANY,

Plaintiff,

v.

BDO SEIDMAN, LLP,

Defendant.

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)
) BDO SEIDMAN, LLP'S
) MEMORANDUM OF LAW
) OPPOSING PLAINTIFF'S MOTION TO
) COMPEL
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BDO Seidman, LLP ("BDO") submits this Memorandum of Law in opposition to Plaintiff Harco National Insurance Company's ("Harco") Motion to Compel BDO Seidman, LLP and the Witness Susan Lister to Answer Certain Deposition Questions and Produce Certain Documents ("Motion to Compel"). Harco's Motion to Compel should be denied because:

- The requested testimony and documents are protected by the work product and attorney-client privileges;
- Plaintiff has made no showing whatsoever of a substantial need and undue hardship as required by Rule 26(b)(3) of the North Carolina Rules of Civil Procedure; and
- BDO has not waived the privilege.

INTRODUCTION

In an attempt to discover BDO's legal theory of the case, Plaintiff seeks production of documents and testimony regarding legal counsel's investigation of the allegations contained in the Complaint, including a review of audit work papers and an interview with the audit engagement partner. Production of the requested documents and testimony would reveal the legal conclusions, mental impressions, opinions and strategy of BDO's former General Counsel, Scott Univer, and Ms. Lister, who was acting at Mr. Univer's direction and under his

supervision. Harco has made no showing whatsoever that it has a substantial need for BDO's counsel's work product, or that it would suffer any hardship by obtaining the materials from another source. To the contrary, Harco has already deposed the audit engagement partner for two full days, as well as every other member of the BDO engagement team. Under these circumstances, Harco's Motion to Compel must be denied.

FACTUAL BACKGROUND

Plaintiff filed the Complaint in this action on February 23, 2005. The Complaint asserted claims for negligence¹ and negligent misrepresentation as a result of BDO's audit of the financial statements of Capital Financial Group, Inc., including its subsidiary Capital Bonding Corporation, (collectively, "CBC") for the period ending December 31, 2002.

I. INITIAL INVESTIGATION

After BDO was served with a copy of the Complaint, Scott Univer, the General Counsel of BDO, commenced an investigation to begin defending against the action. Univer Affidavit, attached hereto as Exhibit 1. Mr. Univer obtained the work papers related to the audit and provided those work papers to Susan Lister, the National Director of Audit Policy for BDO. *Id.*; Lister Dep. at 35-37, attached hereto as Exhibit 2. Mr. Univer asked Ms. Lister to review the work papers and interview Debra Nager, the BDO engagement partner for the CBC audit, to assist him in his assessment of how to respond to the claims and defend the action on behalf of BDO. *Id.* These tasks were not part of Ms. Lister's normal job responsibilities, but were assigned to her by Mr. Univer solely for purposes of defending against the pending action. *Id.*; Lister Dep. at 35, Ex. 2.

As Ms. Lister testified during her deposition, she reviewed the CBC audit work papers per the instructions of Mr. Univer. Lister Dep. at 37-38, Ex. 2. Ms. Lister then interviewed

¹ Harco subsequently withdrew its negligence claim.

Ms. Nager, asking questions based on her discussions with Mr. Univer and her review of the work papers. Lister Dep. at 37-38, Ex. 2. Ms. Lister made notes as she performed these tasks, and she ultimately reported her impressions back to Mr. Univer. *Id.* at 52.

II. DISCOVERY

In response to document requests from Harco, BDO produced a complete set of the CBC audit work papers in March, 2007. BDO also objected and responded to interrogatories in November, 2006, March, 2007, and November, 2007. Ms. Lister verified BDO's interrogatory responses. Lister Dep. at 55, Ex. 2. Ms. Lister verified the responses because the personnel responsible for the CBC audit were, at that time, no longer BDO employees². Deposition discovery began in August, 2007. Harco has deposed every member of BDO's CBC engagement team. Harco deposed the engagement partner, Debra Nager, for two full days. In addition, Harco has deposed the BDO concurring partner, manager, and senior auditor, each for two days. Harco has also deposed two other BDO staff members who worked on the CBC audit, the former Director of Audit Policy and two BDO staff members who worked on the subsequent year's audit, which was never completed and is not at issue in this lawsuit.

III. MS. LISTER'S DEPOSITION

In April 2008, BDO deposed Ms. Lister. During her deposition, Ms. Lister answered all questions about her factual basis for verifying the discovery responses, including her investigation of the allegations of the Complaint and her interview with Ms. Nager. *See generally* Lister Dep., Ex. 2. Based on a privilege objection, however, Ms. Lister did not answer questions that would have revealed the mental impressions, conclusions, strategy, or opinions of either Mr. Univer or herself, to the extent that she acted on behalf of Mr. Univer. For example, Ms. Lister testified at great length about what Ms. Nager told her during the interview and what

² Ms. Nager left BDO in or around March, 2006.

she did “to become comfortable with [her] answer” to various interrogatory responses. *See, e.g.*, Lister Dep. at 46-47, 152-154, 173-74, Ex. 2. By contrast, based on a privilege objection, Ms. Lister did not answer the question, “So did you go to Philadelphia [to meet with Ms. Nager] with some questions in mind based on your review of those work papers?” *Id.* at 91. The answer to this question would be the functional equivalent of answering the question, “Did you and counsel devise a strategy for your interview with Ms. Nager?” On the same grounds, Ms. Lister also declined to answer questions regarding whether she focused her interview of Ms. Nager on particular areas of the audit, the particular work papers she chose to review with Ms. Nager, and any conclusions Ms. Lister reached at the end of her investigation. These questions were asked for only one purpose – to learn the mental impressions and legal strategy developed by BDO’s General Counsel.

On April 30, Harco filed its Motion to Compel, seeking to compel responses to various deposition questions and the production of documents reflecting and related to Ms. Lister’s investigation performed at the direction of BDO’s General Counsel. For the reasons set forth below, Harco’s Motion should be denied.

ARGUMENT

I. THE REQUESTED DOCUMENTS AND TESTIMONY ARE PROTECTED WORK-PRODUCT.

Harco’s Motion to Compel and supporting brief glaringly omit one essential fact: Ms. Lister’s review of the work papers, interview of Debra Nager and documentation thereof were done at the direction of and under the supervision of legal counsel to assist him in assessing the allegations and defending the pending lawsuit. Univer Affidavit, Ex. 1. Ms. Lister’s work constitutes work product and cannot be produced to the opposing party without a showing of

substantial need and undue hardship. Harco has not – and, in fact, cannot – make this necessary showing.

The work product privilege protects documents or tangible things prepared in anticipation of litigation or for trial, by or for a party or the party's agent. N.C. R. Civ. P. 26(b)(3); *Evans v. United Services Automobile Assoc.*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001). The work product of in-house attorneys, outside attorneys and their agents enjoy the same protection. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). If material is created in anticipation of litigation, the party seeking discovery may access the material only by demonstrating (1) a substantial need for the document, and (2) an undue hardship in obtaining its substantial equivalent by other means. N.C. R. Civ. P. 26(b)(3). Rule 26(b)(3) further provides:

[I]n ordering discovery of such materials where the required showing has been made, the court may not permit disclosures of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought ...

N.C. R. Civ. P. 26(b)(3) (emphasis added).

In essence, there are two categories of work product: (1) ordinary work product, and (2) opinion work product containing mental impressions, conclusions, opinions or legal theories. Ordinary work product is discoverable only when the party seeking the discovery shows both substantial need and undue hardship in obtaining the information through alternative means. N.C. R. Civ. P. 26(b)(3). Opinion work product is subject to a higher standard and is generally not discoverable. *Id. See also Willis v. Duke Power Co.*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (holding that the court must allow “no discovery whatsoever of the mental impressions, conclusions, opinions or legal theories of any attorney”) (citation omitted); *Duplan Corp. v. Moulinage*, 509 F.2d 730 (4th Cir. 1974, *cert. denied*, 420 U.S. 997 (1975)) (“In our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of

an attorney's mental impressions, conclusions, opinions or legal theories"). Other than the general guidance of *Willis*, the North Carolina courts have not provided specific direction on the narrow issues presented by Harco's Motion to Compel. In the absence of the North Carolina authority, North Carolina courts have looked to federal precedent for guidance. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989) (Decisions under the Federal Rules of Civil Procedure provide helpful guidance for application of the North Carolina Rules of Civil Procedure); *see* N.C. R. Civ. P. 26(b), cmt. (Rule 26(b)(3) of the North Carolina Rules of Civil Procedure is substantially similar to the Federal Rule); *see, e.g., Cook v. Wake Co. Hospital System, Inc.*, 125 N.C. App. 618, 482 S.E.2d 546 (1997) (adopting the analysis of an Eighth Circuit case).

The United States Supreme Court has ruled in *Hickman v. Taylor* that a party is not entitled to disclosure of oral statements made by witnesses to counsel or counsel's representative. *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). In *Hickman*, the Court affirmed the lower court's ruling that the defendant's attorney could not be required to report on the oral statement given to him by a witness because the information was work product. *Id.* at 513. The Court noted that, where complete and honest answers to interrogatories had been provided by the defendant, and public testimony of the witnesses was otherwise available to the plaintiff, "we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." *Id.* at 509, 512.

Here, Harco similarly seeks testimony and documents that show the strategy mapped out by Mr. Univer for Ms. Lister's interview with Ms. Nager, the focus and purpose of the interview, the notes taken during the interview, and the conclusions reached as a result of the interview. Harco also seeks the notes and impressions of Ms. Lister from her review of the work papers,

which was conducted at the direction of counsel for BDO. The information sought reveals the mental impressions, conclusions, and legal strategy of counsel and his representative. Therefore, they should not be discoverable at all. N.C. R. Civ. P. 26(b)(3). *See also O'Connor v. Boeing North American, Inc.*, 216 F.R.D. 640 (C.D. CA 2003) (upholding the protection of the work product doctrine with respect to interview notes). Despite Harco's contention, legal counsel need not be physically present for the information to be protected. *See generally U.S. v. Nobles*, 422 U.S. 225, 238-39 (1975) (“[A]ttorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”)

If, however, the court concludes that counsel's strategy, mental impressions and opinions at issue here fall outside the category of opinion work product, in order to obtain discovery of these materials, Harco must demonstrate (1) a substantial need, and (2) an undue hardship in obtaining the information elsewhere. Harco alleges neither in its motion and brief and, in fact, can make no such showing.

BDO provided Harco a complete set of BDO work papers over a year ago in discovery. Consequently, Harco is already in possession of whatever work papers Ms. Lister reviewed and took with her to interview Ms. Nager. Additionally, prior to deposing Ms. Lister, Harco deposed Ms. Nager for more than two days – more than ample opportunity to obtain discovery on the underlying facts without requiring disclosure of work product. Armed with this information, Harco has had the same opportunity for analysis as did Mr. Univer and Ms. Lister.

Moreover, contrary to Harco's assertions, Ms. Lister did testify at great length about the underlying facts conveyed to her by Ms. Nager. *See, e.g.*, Lister Dep. at 31-32, 45-47, 49, 143-

146, 153-155, 173-174, 186, Ex. 2. With the exception of counsel's mental impressions, legal strategy and opinions, Harco has the information it seeks. Therefore, Harco can make no showing of substantial need or undue hardship. See *In re International Systems and Controls*, 693 F.2d 1235, 1240 (5th Cir. 1982) (“[D]iscovery of work product will be denied if a party can obtain the information he seeks by deposition” of fact witnesses, as opposed to discovery of the work product of accountants working on behalf of an attorney.); see also *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984) (finding no showing of undue hardship that would allow discovery of witness statements and notes protected by the work product privilege where the witnesses who made the statements were possibly available for deposition); *In re Grand Jury Subpoena*, 622 F.2d 933, 936 (6th Cir. 1980) (finding that there had been no showing of undue hardship when it was not even alleged that the witnesses with knowledge of the information at issue were unavailable to testify).

In light of the fact that Harco has failed to show the requisite substantial need and undue hardship, and because the information sought contains the mental impressions, strategy, conclusions, and opinions of counsel and his representative, Plaintiff's Motion to Compel should be denied. See *Bush Development Corp. v. Harbour Place Assoc.*, 632 F. Supp. 1359 (E.D. Va. 1986) (holding that notations on a complaint relating to potential responses and strategy were protected work product, and noting that the party seeking discovery made no attempt to show substantial need or undue hardship).

II. BDO HAS NOT WAIVED THE PROTECTION OF THE WORK PRODUCT PRIVILEGE.

A. BDO did not waive the protection of the work product privilege by Ms. Lister's verifications.

Harco argues that BDO somehow waived the work product protection of Ms. Lister's work at the direction of counsel when she verified the interrogatory responses. Harco's contention is incorrect—no waiver occurred.

BDO does not concede that any waiver occurred. However, any alleged waiver would be only to the extent necessary to allow Ms. Lister to explain the basis for her verifications of the allegations. *See generally IDS Life Ins. Co. v. Sunamerica, Inc.*, 1995 WL 505497 (N.D. Ill. Aug. 21, 1995), attached hereto as Exhibit 3. Unlike the attorney-client privilege, "broad concepts of subject matter waiver" do not apply to the work product protection of Rule 26. *Duplan Corp. v. Deering Milliken Inc.*, 540 F.2d 1215, 1222 (4th Cir. 1976) (holding that waiver of the work-product protections of Rule 26(b)(3) must be narrowly construed). For example, as the court noted in *IDS Life*:

The witness has given the basis or bases for the allegation in the complaint [that he verified]. Now he is being asked why he chose to give it one legal characterization rather than another. Not only is this irrelevant, it may invade the work product privilege. The factual bases for the allegation have been answered by the witness.

IDS Life, 1995 WL 505497 at *1, Ex.3. Similarly, in this case, Ms. Lister has given the basis for her verification of the interrogatory responses, and BDO is not required to provide information beyond this scope, which would invade the work product privilege.

During her deposition, when asked, Ms. Lister explained the basis for her verification of numerous interrogatories at great length. *See* Lister Dep. at 85-86, 93, 97-98, 100-103, 111-113, 138-141, 144, 152-158, 164-165, 182-184, 188-198, Ex. 2 (explaining the basis for her

verification of Interrogatories Nos. 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 15, 22). Her verifications were based on her personal knowledge of BDO policy, the work papers, and her discussion with Ms. Nager. *Id.* For example, Interrogatory No. 8 requested a description of BDO's assessment of CBC's internal controls. Ms. Lister testified that she relied on her own personal knowledge of BDO's audit procedures and her conversation with Ms. Nager to verify the response. Lister Dep. at 102-103, Ex. 2. To the extent she relied on her meeting with Ms. Nager to verify the responses, she testified to the content of those discussions. *See* Lister Dep. at 143-145, 152-158, 173-174, 182-183, Ex. 2. She also testified regarding specific work papers that are referenced in the interrogatory responses. *See, e.g.,* Lister Dep. at 138-146, Ex. 2. In addition, Harco has already received a complete copy of the work papers and has had the opportunity, during deposition, to question Ms. Nager and others about the audit and the work BDO performed. Thus, Harco has been provided with the documents and with deposition opportunities necessary to evaluate Ms. Lister's verifications of the discovery responses.

However, Ms. Lister's notes, mental impressions of issues, strategy for assessing the claims, and conclusions remain protected by the work product doctrine. Ms. Lister's verifications did not waive this protection. *See generally O'Connor v. Boeing North American, Inc.*, 216 F.R.D. 640 (C.D. Cal. 2003) (finding that interview notes of an investigator are protected by the work product doctrine); *Thomas & Betts Corp. v. Pandult Corp.*, 1999 WL 1129607 (N.D. Ill. Dec. 3, 1999) (holding that the fact that a corporate executive verified discovery responses does not waive the work product privilege, especially with respect to "beliefs, thoughts, personal evaluation or state of mind"), attached hereto as Exhibit. 4. Plaintiff's Brief does not include a single citation to a statement by Ms. Lister that she relied on her notes to verify the discovery responses. Therefore, Ms. Lister's notes and impressions

contained therein remain protected. Because BDO has not waived the work product privilege with respect to the material sought, Plaintiff's Motion to Compel should be denied.

B. It is not necessary to include the documents Harco seeks on a privilege log.

At the close of its Brief, Harco includes a two sentence argument that an inadequate privilege log may result in a waiver of work product doctrine. See Plaintiff's Brief at 13. Harco contends that BDO waived the work product protection for Ms. Lister's notes and other documents created after the filing of this lawsuit by failing to list them on its privilege log. BDO's actions, however, have not waived the work product protection. To the contrary, documents created on or after the date on which a complaint is filed need not appear in a privilege log. *Interstate Indemnity Co. v. Black*, 2003 WL 23269342, at *1 (M.D.N.C. Oct 24, 2003), attached hereto as Exhibit 5.

In support of this argument, Harco cites *Nance v. Thompson Medical Co.*, a case from the Eastern District of Texas, and *Lohrenz v. Donnelly*, a case from the District of Columbia. 173 FRD 178 (E.D. Tex. 1997); 187 FRD 1 (D.D.C. 1999). Both cases predate *Interstate Immunity*. In fact, the court in *Nance* did not even address whether the documents at issue were created before or after the filing of the complaint. *Nance*, 173 FRD at 182-183. In *Lohrenz*, unlike the present case, the party asserting the privilege had not provided a privilege log at all, and that court also did not address the issue of whether the documents had been created prior or subsequent to the initiation of litigation. 187 FRD at 6.

Harco does not list on its privilege log any notes prepared by its counsel and her representatives or any emails between counsel and Harco witnesses. Surely Harco is not contending that they have waived their own privilege as to such documents. Plaintiff's Motion to Compel should be denied to the extent it relates to an allegedly inadequate privilege log.

III. THE REQUESTED TESTIMONY IS PROTECTED ATTORNEY CLIENT COMMUNICATION

In addition to reflecting work product, the testimony Harco seeks to compel also constitutes privileged communications of strategy between Ms. Lister and Mr. Univer, BDO's former in-house counsel. For example, Harco seeks information about what areas of the work papers Ms. Lister discussed with Ms. Nager and what Ms. Lister chose to review in preparation for her meeting with Ms. Nager. Plaintiff's Motion to Compel, ¶12(d), (p). At the core, both of these questions seek the litigation strategy discussed and developed during communications between Ms. Lister and Mr. Univer.

When these communications took place, Mr. Univer was an in-house attorney for BDO and Ms. Lister was acting on behalf of Mr. Univer, at his specific instructions. *See generally* Univer Affidavit, Ex. 1. The communications were made in confidence for the purpose of investigating the allegations of the Complaint. The communications were made in the course of giving and seeking legal advice. All of the threshold requirements for communications to fall within the protection of the attorney-client privilege have been met. *See Isom v. Bank of America*, 177 N.C. App. 406, 628 S.E.2d 458 (2006).

BDO has not waived the attorney-client privilege by Ms. Lister's verification of the interrogatory responses. The information Harco seeks falls far outside the scope of the interrogatories and verifications at issue. For example, Harco seeks to compel testimony regarding Ms. Lister's agenda for her meeting with Ms. Nager and what areas of the audit and work papers Ms. Lister chose to focus on to carry out her assessment for counsel. Lister Dep. at 180-181, Ex. 2. These decisions, which were developed in communication with counsel, are not at issue in any of the discovery responses Ms. Lister verified.

Therefore, such information remains protected by the attorney client privilege. *See generally IDS, supra.* Because BDO has not waived the attorney-client privilege with respect to the testimony sought, Plaintiff's Motion to Compel should be denied.

CONCLUSION

Harco has had full and fair opportunity to depose all employees on BDO's CBC audit engagement team. Ms. Lister was not involved in the CBC audit, but became knowledgeable of the engagement only through her work conducted at the direction of counsel. Harco is now engaged in a "fishing expedition" prohibited by *Willis* and beyond the scope of permissible discovery. *See Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 524 (1980) (citing *Willis* for the proposition that a party is not entitled to a "fishing expedition" in discovery). For the foregoing reasons, Harco's Motion to Compel BDO Seidman, LLP and the Witness Susan Lister to Answer Certain Deposition Questions and Produce Certain Documents should be denied.

This the 23rd day of May, 2008.

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court as reported by the word-processing software used to prepare this document.

By: /s/ Melanie Black Dubis

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BDO SEIDMAN LLP'S MEMORANDUM OF LAW OPPOSING PLAINTIFF'S MOTION TO COMPEL** was served on the plaintiff's counsel and all other counsel of record via United States mail, postage prepaid, by depositing a copy thereof in the United States mail, and by NC Business Court Electronic Filing system:

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