

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

BENJAMIN GOCIAL, M.D.,	:	DECEMBER TERM, 2000
JACQUELINE N. GUTMANN, M.D., and		
DEAN E. BURGET, JR., M.D., on behalf	:	No. 2148
of themselves individually and all others		
similarly situated,	:	
Plaintiffs	:	COMMERCE PROGRAM
v.	:	
INDEPENDENCE BLUE CROSS,	:	
and KEYSTONE HEALTH PLAN	:	
EAST, INC.,	:	
Defendants	:	

OPINION

This Opinion is submitted relative to the appeal by Plaintiffs of this Court’s Order of June 20, 2002, ordering plaintiffs to produce all documents referenced on the log submitted by Wade, Goldstein, Landau and Abruzzo, P.C. Plaintiffs filed their appeal on July 1, 2002. This Court, in turn, issued an Order on July 9, 2002, requiring Plaintiffs to file a concise statement of the matters complained of by July 19, 2002, pursuant to Rule of Appellate Procedure 1925(B) (“1925(b) Statement”). On July 18, 2002, Plaintiffs filed their 1925(b) Statement.

BACKGROUND

This case involves a proposed class action by plaintiffs, Benjamin Gocial, M.D. (“Dr. Gocial”), Jacqueline N. Gutmann, M.D. (“Dr. Gutmann”) and Dean E. Burget, Jr., M.D. (“Dr. Burget”), named health care providers, against defendants, Independence Blue Cross (“IBC”) and Keystone Health Plan

East, Inc. (“Keystone”)¹ asserting that defendants engaged in the practice of arbitrarily and unilaterally denying reimbursement for or reducing payment of medical expense claims for surgical services, products and procedures in violation of provider agreements with defendants. Defendants’ alleged misconduct purportedly included the use of computerized cost containment programs which resulted in the denial of payment for medical services rendered to patients and submitted for reimbursement.

The procedural history of this case has been and continues to be prolonged and convoluted and merits a brief recitation. This action commenced in December 2000 with the filing of the original Complaint. An Amended Complaint was filed on January 29, 2001, which mooted the Preliminary Objections filed by defendants on January 9, 2001. After oral argument and submission of all relevant briefs, this Court issued an Order and Opinion on June 15, 2001, sustaining the Preliminary Objections and directing plaintiffs to file a Second Amended Complaint. The Second Amended Complaint was filed on July 19, 2001. Defendants filed Preliminary Objections thereto. On October 24, 2001, the Court issued an Order, overruling the Objections and directing defendants to file an Answer. On November 13, 2001, defendants filed their Answer with New Matter. Then, on November 19, 2001, the original Motion for Class Certification was filed by the named plaintiffs, Drs. Gocial, Gutmann and Burget. Thereafter, the case has been involved in protracted discovery disputes and a series of extensions have been granted to examine the scope of class discovery. Further, on July 31, 2002, plaintiffs filed an Amended Motion for Class Certification, which purportedly leaves only Dr. Burget as the named representative and removes Drs.

¹Stephen L. Corson, M.D. had been a named plaintiff in the first Amended Complaint, but, pursuant to the Second Amended Complaint filed on July 19, 2001, he is no longer listed in the caption of this action. Further, the Second Amended Complaint added Keystone as a defendant.

Gocial and Gutmann. Plaintiff's Motion to Stay Proceedings, pending the current appeal, was denied by this Court on August 6, 2002. The period for class discovery was also extended for one month pursuant to the Order of August 16, 2002.

The present appeal involves one of the discovery disputes which arose between the parties and concerns the involvement of Bruce Goldstein, Esquire, a partner of Wade, Goldstein, Landau & Abruzzo, L.P. and husband of Dr. Gutmann, a named plaintiff and putative class representative. Specifically, defendants served Notices of Intent to Serve Subpoenas on the following entities: Newtown Professional Billing, Inc. ("Newtown"), Wade, Goldstein, Landau & Abruzzo, L.P. ("Wade Goldstein") and Berger & Montague, P.C. ("Berger"). In response, plaintiffs raised Objections to these Subpoenas pursuant to Pa. R. Civ. P. 4009.21. In turn, defendants responded with a Motion to Strike these Objections. On June 13, 2002, a confidential privilege log submitted by Wade Goldstein on behalf of the Womens' Institute for Fertility, Endocrinology and Menopause ("Womens' Institute")² was produced. The documents referenced in this privilege log are at issue in this appeal.³

On June 17, 2002, the Court heard oral argument regarding this discovery dispute. During oral argument, defendants first represented that they wanted five of the documents listed on the privilege log; specifically, numbers 8, 18, 19, 20 and 21. 6/17/02 N.T. 5-6. Plaintiffs did not object to numbers 8 and 19, but they did object to numbers 18, 20 and 21 on the basis of attorney-client privilege, work product

²The Women's Institute is the entity in which Dr. Gutmann practices and which Bruce Goldstein admittedly represents on matters other than this case. 6/17/02 N.T. 14-16.

³Additionally, this Court, by Order of June 27, 2002, denied the Motion of Berger & Montague, P.C. to Quash the Subpoena and ordered the law firm to produce the responsive documents. This Order is not the subject of this appeal.

and/or an unwarranted “fishing expedition.” 6/17/02 N.T. 7-12. Plaintiffs admitted that Bruce Goldstein had a relationship with class representative, Dr. Gutmann, by way of his marriage to her. 6/17/02 N.T. 8. During oral argument, the Court proceeded to look at the specific document requests and concluded that based on Hale v. Citibank, 198 F.R.D. 606, 607 (S.D. NY 2001), defendants were entitled to any fee agreements or referral agreements that Mr. Goldstein had with any firm in this case⁴ because of the question related to his financial interest in the case while his wife is a class representative. 6/17/02 N.T. 9-10. Plaintiffs’ counsel then asserted that Mr. Goldstein was involved in the initial investigation in accordance with the fee agreement sent out on July 20, 2000 and that he continues to represent the Women’s Institute in other matters, but that he had nothing further to do with the case after the initial stages. 6/17/02 N.T. 14. The Court then examined the “Contingent Fee Agreement,” dated November 30, 2000, which was attached to the confidential privilege log and which listed Wade Goldstein as one of the law firms retained for this class action suit.⁵ The Court asked whether there was any other document concluding Goldstein’s representation in this matter and plaintiffs’ counsel replied in the negative. 7/17/02 N.T. 19-20. Therefore, the Court concluded that Mr. Goldstein continues to be counsel of record along with the other lawyers in the case. The Court thus found that defendants are entitled to all of the documents based on the classic and non-waivable conflict of interest which could exist between Mr. Goldstein, as counsel of record, and his wife, Dr. Gutmann, being a named representative. 6/17/02 N.T. 21-22. The Court also limited production

⁴The record shows that Mr. Goldstein may have referred this matter to the Berger firm, which was later discharged to be replaced by the Law Offices of Jack Meyerson and that the law firm, Gogel Donohue & Gogel, LLP, may have been in the case from the start. 6/17/02 N.T. 9-10.

⁵Gogel Donohue & Gogel, LLP and Berger & Montague were the other two law firms listed on this Agreement. A prior “Contingent Fee Agreement” had been entered into by Dr. Corson, a formerly named representative, and Gogel Donohue & Gogel and Wade Goldstein on July 18, 2000.

of any fee agreement, referral agreement or other document to this case and not to other actions against IBC. 6/17/02 N.T. 27.

Following this ruling, plaintiffs filed its appeal on July 1, 2002. On this same date, plaintiffs filed a Praecipe to Attach the Affidavit of Bruce J. Goldstein, who attested that neither he personally nor his law firm had any financial interest in this litigation or any right to receive any fee or compensation of monies in this class action. Goldstein Aff., ¶ 4. Of course, this affidavit was not presented to the Court during oral argument and was only made a part of the record after the Court's ruling had been made and the appeal had been filed. It, therefore, was not considered by this Court and should have no bearing on the present appeal.

DISCUSSION

In plaintiffs' 1925(b) Statement, they assert that this Court erred in ordering the production of documents contained on the privilege log because these documents are protected by the attorney-client privilege, privileges relating to the joint interests of litigants and/or the attorney work product doctrine. In the alternative, plaintiffs assert that these documents on the privilege log are irrelevant and are sought to harass plaintiffs. Further, plaintiffs contend that this Court erred in concluding that Bruce Goldstein, Esquire is counsel of record and that the production of documents is unnecessary because Mr. Goldstein and the firm, Wade Goldstein, do not have any financial interest in the class action.

As noted *infra*, the basis of this Court's Order of June 20, 2002, ordering the production of the documents was based on the "non-waivable conflict of interest between Mr. Goldstein and his wife as a class representative, Jacqueline Gutmann" and the fact that Mr. Goldstein continues to be counsel of record since the contingent fee agreements have not terminated or been modified nor is there any agreement that

confines his role in this litigation. 6/17/02 N.T. 21.

This ruling was based on the procedural rules governing certification since this case is presently in the pre-certification/class discovery stage. Specifically, Pa. R. Civ. P. 1702(4) requires that: “the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709” in order to maintain the action as a class action. Further, Pa. R. Civ. P. 1709 examines:

- (1) whether the attorney for the representative parties will adequately represent the interests of the class,
- (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
- (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa. R. Civ. P. 1709.

In Murphy v. Harleysville Mut. Ins. Co., 282 Pa. Super. 244, 247-48, 422 A.2d 1097, 1099 (1981), the Pennsylvania Superior Court explain that a conflict of interest may exist where a lawyer acts as the representative plaintiff and as counsel for the class. Moreover, various federal decisions have denied class certification, finding an impermissible conflict of interest which negates the adequacy of representation requirement where the attorney acts as class counsel and is related to the named plaintiff representative. See Hale v. Citibank, 198 F.R.D. 606, 607 (S.D. NY 2001)(husband of representative was class counsel); Jaroslawicz v. Safety Kleen Corp. 151 F.R.D. 324, 328-29 (D.C. Ill 1993)(representative to class counsel was so close to act as de facto partnership); Pope v. City of Clearwater, 138 F.R.D. 141, 144 (D.C. Fla. 1991)(representative was named partner in same law firm as class counsel); Zlotnick v. TIE

Communications, Inc., 123 F.R.D. 189, 193 (E.D. Pa. 1988)(class counsel is son of representative); Kirby v. Cullinet Software, 116, F.R.D. 303, 309 (D.C. Mass. 1987)(same).

Here, it is undisputed that Mr. Goldstein is married to Dr. Gutmann, who was a named class representative at the time of the discovery dispute. 6/17/02 N.T. 8. Further, the contingent fee agreements, which were attached to the privilege log and which list Wade Goldstein as one of the law firms acting as counsel in this class action, have not been terminated or modified. 6/17/02 N.T. 21. It was also admitted that Mr. Goldstein represents the Women's Institute, of which his wife is a member, on other matters. 6/17/02 N.T. 14-16. For these reasons, the Court determined that Mr. Goldstein is still counsel of record. As such, and in line with Hale and the other federal decisions, a potential conflict of interest exists which may affect the adequacy of representation. Therefore, defendants are entitled to discovery of the fee agreements and other documents listed on the privilege log in order to ascertain the scope of this potential conflict.

Generally, discovery is liberally permitted in civil cases and any limitations or restrictions on discovery are narrowly construed. McAndrew v. Donegal Mut. Ins. Co., 56 Pa. D. & C.4th 1, 7 (C.P. Lackawanna Cty. May 17, 2002)(citations omitted). Doubts regarding the ability to discover information are to be resolved in favor of allowing discovery. Id. Further, the party objecting to the production of discovery generally bears the burden of demonstrating that the material is not discoverable. Id.

Under the Pennsylvania Rules of Civil Procedure, a party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .". Pa. R. Civ. P. 4003.1. The attorney-client privileged is codified as follows:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon trial by the client.

42 Pa.C.S.A. § 5928. The attorney-client privilege is designed to “foster confidence between a client and his or her attorney that will lead to a ‘trusting and open attorney-client dialogue’.” Joyner v. SEPTA, 736 A.2d 35, 39 (Pa. Commw. Ct. 1999)(citations omitted). The privilege may be waived “when the communication is made in the presence of or communicated to a third party or to the court, when the client relies on the attorney’s advice as an affirmative defense, or **when the confidential information is placed at issue.**” Bonds v. Bonds, 455 Pa.Super. 610, 615, 689 A.2d 275, 277 (1997)(emphasis added).

Additionally, information may be protected pursuant to the work product doctrine which protects from disclosure, *inter alia*, “the mental impressions of a party’s attorney, or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories . . . [or] his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.” Pa. R. Civ. P. 4003.3.

Here, plaintiffs were not specific as to which documents were protected by the attorney-client privilege or work product doctrine. Clearly, any fee agreements or other documentation showing Mr. Goldstein’s representation or involvement in this case are relevant and would fit under the “at-issue” exception to the attorney-client privilege because such involvement could support defendants’ opposition to class certification. Certain one-word descriptions of other documents on the privilege log also show that these documents are already part of the record. Plaintiffs’ counsel, Mr. Gogel, admitted as much during oral argument. 6/17/02 N.T. 19. Other documents refer to claim forms requests and should be

discoverable as relevant to this litigation. Moreover, it is unclear which documents, if any, would be protected by the work product doctrine according to the description on the privilege log and plaintiffs' failure to be more specific at oral argument or any time thereafter.

CONCLUSION

For the reasons stated above, this Court determined that all of the documents on the privilege log were discoverable by defendants and ordered their production on June 20, 2002.

BY THE COURT,

JOHN W. HERRON, J.

Dated: September 4, 2002