

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

CHRISTOPHER BOTKIN and SUZANNE BOTKIN,)	
)	
Plaintiffs,)	Civil Action No. 5:10cv00077
)	
v.)	
)	
DONEGAL MUTUAL INSURANCE COMPANY,)	
)	
Defendant.)	
)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on outstanding discovery issues stemming from plaintiffs’ Motion to Compel and defendant’s related Motion for Protective Order, as well as defendant’s recently filed Motion to Continue Trial and Modify Pretrial Deadlines and Third Motion for Protective Order. For the reasons set forth below, plaintiffs’ Motion to Compel (Docket #28) is **DENIED**, and defendant’s Motion for Protective Order (Docket #32), Motion to Continue Trial (Docket #66), and Third Motion for Protective Order (Docket #68) are all **GRANTED**.

I

A hearing was held in this matter on January 31, 2011, at which counsel presented argument on a number of discovery motions. By Order dated February 2, 2011, the court granted plaintiff’s motion to limit bifurcation to trial and allowed the parties to proceed with discovery on plaintiff’s bad faith claim. The court ordered in camera production of certain of Donegal’s claim file notes and took plaintiff’s motion to compel and defendant’s motion for protective order under advisement to give the parties an opportunity to resolve the remaining discovery disputes. The parties were not able to resolve the disputes, however, and the outstanding issues – principally concerning Donegal’s assertion that attorney work product,

privileged communications, and settlement negotiations are protected from discovery – were discussed at a February 14, 2011 hearing. By Order entered the same date, the court directed Donegal to produce for in camera review coverage counsel’s opinion letter and the Danielson investigative file.¹ The parties were given ten days to brief the issue of privilege as it relates to these documents. Both parties have exhaustively briefed the issues, and these matters are now ripe for decision.

At the January 31, 2011 hearing, counsel for plaintiffs advised the court that he would be traveling out of the state and would be unavailable for an extended period of time beginning in mid-February. The parties agreed that discovery would not proceed in this case during this period. Following counsel’s return, Donegal moved for continuance of the June 30th trial date and modification of the pretrial deadlines, arguing a number of witnesses still need to be deposed and modification of the court’s scheduling order is appropriate under the circumstances. Donegal also filed a motion for protective order concerning the location of its Rule 30(b)(6) deposition. A hearing on this issue and the motion for continuance was held on May 26, 2011.

II

A. Claim File Notes

Pursuant to the court’s February 2, 2011 Order, Donegal produced in camera its claim file notes dating from January 9, 2009 to the filing of this suit, as well as an unredacted version of the claim file notes dating from November 19, 2008 to January 9, 2009 that had previously been produced to plaintiffs in redacted form. With those notes, Donegal produced copies of the redacted versions as well as an index identifying the date of production and reason for redaction.

¹ The parties subsequently informed the court that they were able to resolve the issues related to the Danielson investigative file.

According to this index, Donegal produced on November 9, 2010 an unredacted version of the claim file notes pages 24-32 dating from September 18, 2008 to November 14, 2008 (Bates label DMIC801-809). It also appears that between Donegal's Rule 26(a)(1) disclosures on October 1, 2010 and discovery responses on November 9, 2010, plaintiffs received all of page 23 of the claim file notes dating from November 14 through 18, 2008, except for the last line of the first paragraph on page 23, which Donegal redacted and claims is protected by the work product doctrine (see Bates label DMIC051 & DMIC800). Pages 21 and 22 of the claim file notes dating November 19, 2008 through January 12, 2009 were produced in redacted form (Bates label DMIC049-050). Pages 1 through 20 of Donegal's claim file notes, dating January 12, 2009 through August 5, 2010, have not been produced (Bates label DMIC778-797). Thus, at issue in this discovery dispute are pages 1-20 and the redacted portions of pages 21-23 of Donegal's claim file notes. Donegal argues these notes are protected by the work product doctrine and/or the attorney-client privilege and need not be produced.

Donegal claims that on November 19, 2008,² it informed the Botkins that it was denying their claim as regards the two antique automobiles at issue in this case, and that the Botkins told Donegal they were retaining counsel. (See Def.'s Mem. In Support of Mot. for Protective Order, Docket #33, at 6.) Thus, Donegal argues, "[f]rom that point forward, the documents and information generated by Donegal were made in anticipation of litigation," and are protected work product. Id. at 6-7.

Materials prepared "in anticipation of litigation or for trial" by a party or its representative are protected from discovery. Fed. R. Civ. P. 26(b)(3)(A). Such "work product" materials are only discoverable (1) if "they are otherwise discoverable under Rule 26(b)(1)," and

² On brief, Donegal states it was informed on November 18, 2008 that plaintiffs were retaining counsel. (See Def.'s Mem. In Support of Mot. for Protective Order, Docket #33, at 6.) Review of the claim file notes, however, reveals that this conversation occurred on November 19, 2008. (See Bates label DMIC799.)

(2) if the requesting “party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Id.³

As the Fourth Circuit has explained, “the mere fact that litigation does eventually ensue does not, by itself, cloak materials with work product immunity.” Nat’l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 984 (4th Cir. 1992) (quotation omitted). Rather, the document:

must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation. Thus, we have held that materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3).

Id. (emphasis in original) (citations omitted). This “because of” standard was “designed to help district courts determine the driving force behind the preparation of the work product” and distinguish between that which is created in anticipation of litigation and that which is created in the ordinary course of business. RLI Ins. Co. v. Conseco, Inc., 477 F. Supp. 2d 741, 746-47 (E.D. Va. 2007).

With respect to work product claims by insurance companies, “[t]he nature of the insurance business requires an investigation prior to the determination of the insured’s claim.” State Farm Fire & Cas. Co. v. Perrigan, 102 F.R.D. 235, 237 (W.D. Va. 1984). Thus, there is no bright-line test for when work product protection applies for insurance companies, and instead courts must undertake a case-by-case analysis. Id. at 238. “This approach realistically

³ If a “court orders discovery of [work product] materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B). Such “opinion work product . . . enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.” In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994).

recognizes that at some point an insurance company shifts its activity from the ordinary course of business to anticipation of litigation.” Id. The “pivotal point” is when the probability of litigation becomes “substantial and imminent,” or stated otherwise, when litigation becomes “fairly foreseeable.” Id.

Donegal argues the pivotal date in this case was November 19, 2008 when it informed the Botkins that it was denying coverage for the two antique automobiles and the Botkins told Donegal they planned to contact an attorney. But a formal denial letter was not mailed to the Botkins until January, 2009. Still, it is clear from a review of the claim file notes that the decision to deny coverage was made and communicated to the Botkins in November, 2008.⁴ Donegal’s position on the issue of coverage did not change after that point. It made no representation that its investigation was ongoing. Cf. Schwarz & Schwarz of Va. v. Certain Underwriters at Lloyd’s, London, No. 6:07cv00042, 2009 WL 1043929, at *3 (W.D. Va. Apr. 17, 2009) (finding work product protection attached as of the date Lloyd’s disclaimed coverage, because in camera review revealed investigation was ongoing prior to that date). Rather, Donegal clearly articulated the status of the Botkins’ claim as regards the two antique automobiles – coverage was denied. Given the particular facts of this case, the court finds November 19, 2008 to be the pivotal point at which the prospect of litigation became “substantial and imminent,” or “fairly foreseeable.” See Front Royal Ins. Co. v. Gold Players, Inc., 187 F.R.D. 252, 257 (W.D. Va. 1999) (finding litigation was not “substantial and imminent” until the insurance carrier decided it was not going to pay this claim and notified the insured); see also Perrigan, 102 F.R.D. at 239 (determining that an insurance investigative report was discoverable,

⁴Plaintiffs do not appear to dispute this date. Plaintiffs’ counsel acknowledged at the January 31, 2011 hearing that the decision to deny coverage was made and communicated to the Botkins over the phone in November, 2008.

in part, because when it was created, the insurer “was in the process of adjusting the claim [and] had not decided whether to pay the loss”).

Plaintiffs argue that Donegal’s December, 2009 settlement offer and the appraisal used to form the basis for that offer (the “Ferguson appraisal”) is not protected work product, because “[i]nsurance companies are litigation machines” and settling claims is part of their ordinary course of business. (See Pls.’ Br. Regarding Discovery, Docket #59, at 9.) But the Ferguson appraisal is unlike the Big Crash Appraisal that was obtained in the ordinary course of business during Donegal’s initial investigation of the claim, which has been produced to plaintiffs. The Ferguson appraisal plainly was obtained for the sole purpose of making a settlement offer because of the prospect of litigation. Review of the claim file notes reveals Donegal would not have sought a valuation by Ferguson if not for its desire to negotiate a settlement and avoid the risk and cost of litigation. It was not created in the ordinary course of business. Rather, it was created solely because of the impending litigation and is therefore protected by the work product doctrine.

As such, pages 1-20 and the redacted portions of pages 21-23 of Donegal’s claim file notes are immune from discovery and need not be produced.⁵ Plaintiff’s Motion to Compel (Docket #32) is **DENIED** and defendant’s Motion for Protective Order (Docket #32) is **GRANTED** in this regard.

B. Correspondence with Coverage Counsel

The Botkins seek production of Donegal’s communications with coverage counsel, Craig D. Roswell and David T. Lampton, Esq., and their firm Niles, Barton and Wilmer, LLP.

⁵ Because all of the disputed claim log entries are protected from discovery by the work product doctrine, the court sees no reason to discuss the applicability of the attorney-client privilege.

Donegal argues these communications (Bates label DMIC708-723) are protected by the attorney-client privilege and need not be produced.

The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). When the privilege applies, it protects all confidential communications between lawyer and client from disclosure. Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998); Better Gov’t Bureau, Inc. v. McGraw, 106 F.3d 582, 600 (4th Cir. 1997). Given that it impedes the full and free discovery of the truth, however, the privilege must be narrowly construed. Hawkins, 148 F.3d at 383. A party asserting the attorney-client privilege has the burden of proving its existence by showing:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. at 383.

In this case, Donegal was clearly a client of Niles Barton. The communications at issue were between Donegal and licensed counsel and were made in confidence for the purpose of securing a legal opinion. Donegal has asserted the protection of the attorney-client privilege. The question, therefore, is whether that privilege has been waived.

“A client can waive an attorney-client privilege expressly or through his own conduct.” Hanson v. U.S. Agency for Int’l Dev., 372 F.3d 286, 294 (4th Cir. 2004). Such conduct may

include asserting claims or defenses that put an attorney's advice at issue – for example, by asserting reliance on counsel as an affirmative defense. Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994). But it is often difficult to determine whether a party has placed an attorney-client communication at issue. Balt. Scrap Corp. v. David J. Joseph Co., No. L-96-827, 1996 WL 720785, at *25 (D. Md. Nov. 20, 1996). The court in Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), set forth a framework for determining whether the party asserting a privilege has impliedly waived it through his own affirmative conduct. Courts must determine whether: a) the assertion of privilege was the result of some affirmative act, such as filing suit, by the asserting party; b) through this act, the asserting party put the protected information at issue by making it relevant to the case; and c) application of the privilege would have denied the opposing party access to information vital to his defense. Id. at 581. Although the Hearn framework has not been met with universal acceptance, it remains the most widely accepted approach. Metric Constructors, Inc. v. The Bank of Tokyo- Mitsubishi, Ltd., No. 5:97-CV-369BR1, 1998 WL 1742589, at *6 n.6 (E.D.N.C. Sept. 28, 1998); see also City of Myrtle Beach v. United Nat'l Ins. Co., No. 4:08-1183-TLW-SVH, 2010 WL 3420044 (D.S.C. Aug. 27, 2010).

Donegal argues there has been no implied waiver here because it has not taken affirmative steps to place the attorney-client communications at issue. Specifically, Donegal argues that it is not relying on an advice of counsel defense in this case. (See Ex. 2 to Pl.'s Resp. to Donegal's Mem. Supporting Appl. of Attorney-Client Privilege Regarding Coverage Counsel, Docket #61, at 157.) Plaintiffs, however, contend that Stacey Callahan's deposition testimony,

in which she acknowledged that Donegal relied on the advice of counsel in denying the Botkins' claim, is enough to constitute waiver.⁶ Stacey Callahan testified as follows:

Q. . . . Did Mr. Roswell [of Niles Barton], anything that Mr. Roswell or his opinion or anything else – I'm not asking what it was. I'm just asking you, did that have anything to do with Donegal's decision to deny coverage?

...

A. The Niles Barton firm had given us the coverage analysis, and based on their analysis – partially based on their analysis, we denied coverage.

Id. at 160. When asked whether she agreed with the decision to deny coverage, Stacey Callahan answered affirmatively and explained:

. . . [T]he supervisors, the managers, I mean, they all have experience, you know, far more than what I have, and it was, you know, using their experience.

And then the additional case – the Robertson case, coverage analysis from Niles Barton, all that information was additional information that, you know, said to me, well, look, these could be considered motor vehicles. It's not just as simple as saying that they're parts or a motor vehicle. It's – you know, they could be considered motor vehicles.

Id. at 300-01. Plaintiffs argue that Callahan's deposition testimony makes plain that Donegal relied on the advice of counsel in denying coverage for this claim. Thus, Donegal has put that legal advice at issue and waived any privilege. (Pl.'s Resp. to Donegal's Mem. Supporting Appl. of Attorney-Client Privilege Regarding Coverage Counsel, Docket #61, at 3.)

Donegal asserts the court's decision in Sayre Enterprises, Inc. v. Allstate Insurance Company, No. 5:06cv36, 2006 U.S. Dist. LEXIS 89097 (W.D. Va. Dec. 11, 2006) (Welsh, J.), supports its position that there has been no implied waiver here. In Sayre, the court held that a

⁶ It is worth noting that Stacey Callahan was not testifying as a designated corporate representative in a deposition noticed pursuant to Rule 30(b)(6).

general pleading cannot give rise to an advice of counsel defense that waives the attorney-client privilege. Sayre previously had brought and settled an equity claim against Larry Arntz, Inc. (LAI) and several of its employees. LAI's business liability insurer, Allstate, denied coverage and declined to defend the matter. As part of the settlement, Sayre received a written assignment of rights against Allstate for its failure to defend or indemnify LAI. Sayre then brought suit against Allstate, seeking to recover damages for Allstate's breach of its indemnity obligation and attorney's fees and costs. Diversity of citizenship gave rise to federal jurisdiction, and in the course of discovery, Sayre requested a full and complete copy of the carrier's file material pertaining to the LAI claim. Allstate provided a majority of the file material but declined to produce correspondence with coverage counsel, claiming protection of the attorney-client privilege.

Sayre argued that Allstate waived its right to rely on the attorney-client privilege because it relied on the advice of counsel and/or invoked the advice of counsel defense in its responsive pleading. Specifically, Sayre pointed to Allstate's seventh affirmative defense, in which it stated: "The decisions of Allstate . . . were reasonable, and appropriate and supported by an appropriate interpretation of the policy, and the law in the Commonwealth of Virginia." *Id.* at *7 n.4. Sayre argued this affirmative defense makes the advice of counsel relevant for purposes of discovery, and claimed it "is entitled to know how the decision to deny coverage came into being." *Id.* at *7, 11. The court disagreed, finding "[s]uch a general pleading is insufficient to set forth a cognizable 'advice of counsel' defense and insufficient even to inject a new factual defense. It does no more than deny the plaintiff's principle allegations." *Id.* at *12-13.

Plaintiffs assert Sayre can be distinguished on its facts. (See Pl.'s Resp. to Donegal's Mem. Supporting Appl. Of Attorney-Client Privilege Regarding Coverage Counsel, Docket #61,

at 2.) To be sure, the issue in Sayre revolved around the specific language of an affirmative defense, while the issue in this case concerns Donegal's reliance on coverage counsel's opinion in denying coverage, as acknowledged by Stacey Callahan in her deposition. But Sayre's holding – that a party cannot read a cognizable advice of counsel defense into a general pleading – is still instructive.

Much like this case, the plaintiff in Sayre argued its bad faith claim was integral to its claim, which was factually intertwined with the advice of counsel. Id. at *11. Also as in Sayre, Donegal has not taken the affirmative step of placing the advice of counsel in issue. It has neither pled advice of counsel as an affirmative defense, nor made it an element of its defense in this case. See Rhone-Poulenc Rorer Inc., 32 F.3d at 863 (noting the privilege can be impliedly waived when a party asserts reliance on the advice of counsel as an affirmative defense or as an essential element of its defense); Balt. Scrap Corp. v. David J. Joseph Co., No. L-96-827, 1996 WL 720785, at *24 (D. Md. Nov. 20, 1996) (“In the majority of cases where courts have found this form of waiver, the party asserting the privilege has taken affirmative steps to place the privileged communication into issue for his or her own benefit.”). Plaintiffs have offered no evidence other than Stacey Callahan's deposition testimony to suggest that Donegal interjected the advice of counsel into this litigation. And Callahan's response to a question about whether Niles Barton's advice factored into Donegal's decision to deny coverage is not enough to show that Donegal put its communications with counsel at issue. See Cincinnati Ins. Co. v. Zurich Ins. Co., 198 F.R.D. 81, 88 (W.D.N.C. 2000) (“While it is true that Cincinnati has placed [counsel's] *knowledge and opinions* at issue, Cincinnati has not so implicated the contents of *confidential communications* to mandate their production.” (emphasis in original)). The mere fact that Donegal relied on the opinion of coverage counsel in denying plaintiffs' claim does not waive

the attorney-client privilege. Certainly, when Donegal enlisted the assistance of Niles Barton in this matter, it intended to rely on counsel's advice. There would be little point in retaining coverage counsel to issue an opinion if a party did not intend to rely on it. Likewise, if reliance always gave rise to waiver in this circumstance, no one would seek coverage counsel's advice.

The court in Baltimore Scrap Corp. explained:

The justification for finding waiver of the privilege in these cases is that it would be inequitable to permit the party to use the attorney-client privilege as a sword by placing the advice of the attorney at issue while permitting the same party to use the attorney-client relationship as a shield to prevent inquiry into the asserted claim or defense.

1996 WL 720785, at *24. Donegal has not used the attorney-client privilege as a sword in this litigation. See also id. at *26 (“In determining whether a party has impliedly waived the attorney-client privilege, I am persuaded that the principal inquiry should focus upon whether or not the proponent of the privilege is relying upon the privileged communication to prove his or her case.”). Donegal's reliance on coverage counsel's opinion, without more, is not sufficient enough to show it put the advice of counsel “at issue.” Thus, the first Hearn factor has not been met.

While Callahan's deposition testimony may have made the Niles Barton opinion letter relevant to the litigation, “[r]elevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.” Rhone-Poulenc Rorer Inc., 32 F.3d at 864. If relevance were the standard, the interest served by the attorney-client privilege – ensuring a client that he or she can consult with counsel in confidence – would be completely undermined. Id. “[B]ecause the definition of what may be relevant and discoverable from those consultations may depend on the facts and

circumstances or as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.” Id.

In short, the Hearn factors do not establish implied waiver in this case. As such, plaintiffs’ Motion to Compel (Docket #32) is **DENIED** and defendant’s Motion for Protective Order (Docket #32) is **GRANTED** as regards communications with coverage counsel. By the same token, Donegal may not mention the Niles Barton opinion in its evidence at trial.

III

Defendant has moved to continue the trial in this matter currently scheduled for June 30 – July 1, 2011, and to modify the pretrial deadlines accordingly. Plaintiffs represent they have no objection to a continuance. Given the current posture of this case, the undersigned finds a brief continuance to be appropriate. As such, defendant’s Motion to Continue Trial (Docket #66) is **GRANTED**. The trial will be rescheduled for **October 12-13, 2011**. An appropriate scheduling order modifying the deadlines will be entered.

IV

Finally, plaintiffs have served notice of their intent to take the Rule 30(b)(6) deposition of Donegal at plaintiffs’ counsel’s offices in Staunton, Virginia. Defendant moves for entry of a Protective Order directing that Donegal’s Rule 30(b)(6) deposition be conducted in the Eastern District of Pennsylvania where Donegal’s principal place of business is located. Plaintiffs assert that the facts and circumstances of this case justify holding the deposition in the forum district.

Courts have broad discretion to determine the appropriate location for a deposition. Armsey v. Medshares Mgmt. Serv., Inc., 184 F.R.D. 569, 571 (W.D. Va. 1998). Ordinarily, a plaintiff’s deposition will be held in the forum district, as plaintiff in selecting the forum has

consented to participating in proceedings there. In re Outsidewall Tire Litig., 267 F.R.D. 466, 471 (E.D. Va. 2010). However, “because a non-resident defendant ordinarily has no say in selecting a forum, an individual defendant’s preference for a situs for his or her deposition near his or her place of residence – as opposed to the judicial district in which the action is being litigated – is typically respected.” Id. The same applies to corporate defendants; the initial presumption is that a corporate defendant should be deposed in the district of the corporation’s principal place of business. Id.; Armsey, 184 F.R.D. at 571 (quoting Turner v. Prudential Ins. Co. of Am., 119 F.R.D. 381, 383 (M.D.N.C. 1988)). “To be sure, this presumption may be overcome, but only where circumstances exist distinguishing the case from the ordinary run of civil cases.” In re Outsidewall, 267 F.R.D. at 472 (citing Salter v. Upjohn Co., 593 F.2d 649, 651-52 (5th Cir. 1979)). Factors that may overcome the presumption and persuade a court to permit the deposition be taken elsewhere include: (1) location of counsel in the forum district; (2) the number of corporate representatives to be deposed; (3) the likelihood that significant discovery disputes will arise and necessitate resolution by the forum court; (4) whether the persons sought to be deposed often engage in travel for business purposes; and (5) the equities with regard to the nature of the claim and the parties’ relationship. Armsey, 184 F.R.D. at 571 (citing Resolution Tr. Corp. v. Worldwide Ins. Mgmt. Corp., 147 F.R.D. 125, 127 (N.D. Tex. 1992) and Turner v. Prudential Ins. Co. of Am., 119 F.R.D. 381, 383 (M.D.N.C. 1988)); accord Rapoca Energy Co., L.P. v. Amici Export Corp., 199 F.R.D. 191, 193 (W.D. Va. 2001). “[T]he court must consider each case on its own facts and the equities of the particular situation.” Rapoca Energy, 199 F.R.D. at 193.

The factors set forth in Armsey weigh in favor of holding the Donegal 30(b)(6) deposition in the Eastern District of Pennsylvania. While plaintiffs assert the first factor leans in their favor because counsel for both parties are located in Virginia, the factor to be considered is the location of counsel within the forum district. Only plaintiffs' counsel is located within the forum district; defense counsel is located in the Eastern District of Virginia. The second factor does weigh in plaintiff's favor, however. Donegal has designated only one corporate representative, William A. Folmar, who would be forced to travel were the court to decide that the deposition should take place in the Western District of Virginia. On the other hand, three lawyers must travel to the Eastern District of Pennsylvania should the deposition be held there.

At the hearing, plaintiffs argued that the third factor presents one of the most compelling reasons to hold the deposition in the forum district. Plaintiffs contend that this litigation has been rife with discovery disputes and argue they expect numerous objections to be raised at the 30(b)(6) deposition.⁷ Donegal, however, asserts that the parties have taken nine other depositions in this case and have not required the court's intervention. To get a general sense for the way depositions have been conducted in this case, the undersigned has reviewed the deposition of Donegal adjuster Stacey Callahan. Nothing in the Callahan deposition suggests that the court will need to monitor the conduct of the parties during the 30(b)(6) deposition. Additionally, with respect to the fourth factor, there is no evidence that the corporate designee, Mr. Folmar, routinely travels to the forum district. (See Folmar Aff., Ex. 1 to Docket #72, at 2.)

⁷ Specifically, plaintiffs claim that Folmar "has personal knowledge of very few areas of inquiry" and they anticipate he "will claim lack of knowledge or extremely limited knowledge with regard to numerous questions." (Pl.'s Resp. to Donegal's Third Mot. for Protective Order, Docket #71, at 3.) In the course of briefing the instant motion, Donegal has cited to and is no doubt aware of the court's opinion in Spicer v. Universal Forest Products, in which the undersigned sanctioned a party for its abject failure to provide a 30(b)(6) witness who could testify about information known or reasonably available to the organization. See No. 7:07cv462, 2008 WL 4455854 (W.D. Va. Oct. 1, 2008). The court has no reason to believe at this point that Mr. Folmar lacks knowledge of the areas of inquiry, and the court declines to presume that Donegal intends to flaunt the rules in such a fashion.

Finally, the fifth factor – the equities with regard to the nature of the claim and the parties’ relationship – does not overcome the presumption that the deposition should be held in the Eastern District of Pennsylvania. While plaintiffs argue that the insurance policy at issue was purchased in the Western District of Virginia and the loss occurred in this district, Donegal does not have offices in the Western District of Virginia and only sells insurance in this district through independent agents. See id. at 2. There has been no evidence of any delay on the part of Donegal in taking these depositions. See E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 268 F.R.D. 45, 56 (E.D. Va. 2010) (“The primary equitable consideration is the conduct by Kolon as an entity . . . to needlessly delay the deposition of these persons.”). Finally, plaintiffs have offered no evidence to suggest that travelling to Marietta, Pennsylvania for the deposition would undue cause financial hardship.

Weighing the Armsey factors, the balance tips in favor of holding Donegal’s Rule 30(b)(6) deposition in the Eastern District of Pennsylvania where its corporate offices are located. As such, defendant’s Third Motion for Protective Order (Docket #68) is **GRANTED**.

It is **SO ORDERED**.

Entered: June 15, 2011

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge