

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

VAUGHAN REGIONAL MEDICAL )  
CENTER, LLC, RALEIGH GENERAL )  
HOSPITAL, LLC, LIFEPOINT RC, )  
INC., HSCGP, LLC, PRHC-ALABAMA, )  
LLC, LIFEPOINT HEALTH, INC., and )  
LIFEPOINT WV HOLDINGS, INC., )  
 )  
Plaintiffs, )  
 )  
VS. ) NO. 16-238-BC  
 )  
STEADFAST INSURANCE )  
COMPANY, )  
 )  
Defendant. )

**ORDER FROM IN CAMERA INSPECTIONS**

In an August 17, 2017 *Memorandum And Order*, the Court took under advisement:  
(1) a portion of *Plaintiff's Second Motion To Compel* concerning production of documents related to Defendant's premium calculations and (2) a portion of *Defendant's Motion To Compel* production of documents provided in a February 2015 Board Meeting. The matters were taken under advisement to perform *in camera* inspections.

After conducting the inspections, the following rulings are issued, and the facts, law and reasoning for the rulings are stated.

## Defendant's Motion To Compel – February 2015 Documents Provided To Board

### Not Discoverable

With respect to the February 2015 entry listed on page 7 of the privilege log, LIFEPOINT 017984-017990 (the “PowerPoint Presentation”), the Court denies the *Defendant's Motion To Compel* and, based upon the attorney-client privilege, it is ORDERED that these documents are not to be produced.

In so ruling, the Court has applied Tennessee law that the burden for demonstrating grounds for assertion of the attorney-client privilege is on the party asserting the privilege, in this case, Plaintiff LifePoint Health, Inc.

The attorney-client privilege is the oldest privilege recognized in Tennessee both at common law and by statute. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn.Ct.App.2002) (citations omitted). The privilege “encourages full and frank communication between attorney and client by sheltering these communications from disclosure.” *State ex rel. Flowers*, 209 S.W.3d at 615–16 (citing Tenn. Code Ann. § 23–3–105; *Federal Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 330 (Tenn.1991)). The attorney-client privilege, however, is not absolute, and does not encompass all communications between an attorney and a client. *Id.* at 616 (citing *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn.Crim.App.1992)). “[W]hether the attorney-client privilege applies to any particular communication is necessarily question, topic and case specific.” *Bryan*, 848 S.W.2d at 80. To invoke the protection of the attorney-client privilege, the burden is on the client to “establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential.” *State ex rel. Flowers*, 209 S.W.3d at 616 (citing *Bryan*, 848 S.W.2d at 80).

*Culbertson v. Culbertson*, 393 S.W.3d 678, 684 (Tenn. Ct. App. 2012).

The standard the Court has applied to the documents produced *in camera* is that stated in the United States Supreme Court case of *Upjohn Co. v. United States*, 449 U.S. 383, 394–95, 101 S. Ct. 677, 685, 66 L. Ed. 2d 584 (1981) in the context of corporate counsel.

The opinion does suggest limitations however, in that such information will be privileged only if: (1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself.

§ 87.1. Background and policy of the privilege: (b) Applications in corporate, governmental and other entity settings, 1 MCCORMICK ON EVID. § 87.1 (7th ed.) (footnote omitted).

The Court has also considered the following case law explanation of application of the attorney-client privilege when information is furnished to a corporate board.

The attorney-client privilege protects only communications between attorney and client where legal advice is sought.

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Documents created for business reasons which contain neither a request for legal advice nor rendition of legal advice, or were not intended to assist in prosecution or defense of a lawsuit, are not protected from discovery by the attorney-client or the work product privileges. *In Re Baimco Sec. Litig.*, 148 F.R.D. 91 (S.D.N.Y.1993). On the other hand, if the document in question clearly requests or gives legal advice, or contains traditional work product information, it is protected from disclosure. *Baimco, supra.*; *Great Plains Mut.Ins.Co., Inc. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193 (U.S.D.C.Kan.1993). The mere fact that such protected information is furnished to a corporate board or audit committee which then makes business use of such advice, does not convert legal advice into discoverable business advice. *Great Plains Mut.Ins.Co., Inc., supra* at 197; *In Re LTV Sec.Litig.*, 89 F.R.D. 595, 600 (U.S.D.C.N.D.Tex.1981).

*Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at \*1, \*3 (S.D. Fla. May 18, 1998), *opinion clarified*, No. 95-2152-CIV, 1998 WL 35333391 (S.D. Fla. June 23, 1998).

Applying the foregoing cases and conducting an *in camera* inspection of LIFEPOINT 017984-017990, the Court concludes that Plaintiff LifePoint Health, Inc. has

satisfied its burden of establishing that the PowerPoint Presentation is protected by the attorney-client privilege.

The evidence submitted in support of protection under the attorney-client privilege is the August 10, 2017 affidavit of David Fausett, the Vice President of Risk Management For LifePoint Health. This affidavit provides that the PowerPoint Presentation was prepared by Mr. Fausett, who is not an attorney, at the request of LifePoint's corporate counsel. The Fausett affidavit establishes that the PowerPoint was presented to the LifePoint Board in the presence of Corporate Counsel. The *in camera* inspection established that time was allocated for questions from the Board. The affidavit further establishes that this document was created to provide legal advice to the Board about the underlying tort litigation and that part of that advice included the role of professional liability insurance. The foregoing points are derived from the following excerpt of Mr. Fausett's affidavit.

7. At the request of LifePoint's then-Chief Legal Officer, Paul Gilbert, I prepared the PowerPoint presentation with the bates labels LIFEPOINT 017984-017990. I also presented it to Mr. Gilbert and the rest of the LifePoint Board of Directors as an update at a Board of Directors meeting in February 2015. At the time I prepared the PowerPoint and presented it to the Board, LifePoint and certain subsidiaries in Alabama were already facing 9 individual lawsuits and 1 class action arising from the cardiac matters. Additionally, in West Virginia, LifePoint and certain subsidiaries there were already parties to 2 lawsuits arising from the cardiac matters. Moreover, at the time of the request to make this presentation, the West Virginia market was the target of print ads by a least one plaintiffs' firm targeting patients of Raleigh General who had undergone cardiac procedures. This was further inflamed by news of the litigation in both print and television media. Thus, it was important for the Board to be updated on this litigation and understand the role of the Company's professional liability insurance as it related to the cardiac

litigation from the perspective of the company's legal and insurance professionals who provided those views jointly. It was my understanding that the presentation was to be kept confidential between Mr. Gilbert, the Board, and myself, as it was directly related to the underlying cardiac litigations.

*Second Affidavit Of David Fausett In Support Of Plaintiffs' Response In Opposition To Defendant's Motion To Compel Discovery*, pp. 2-3, ¶ 6-7 (Aug. 10, 2017).

The Fausett affidavit establishes the criteria stated in the law to protect the PowerPoint Presentation from production under the attorney-client privilege.

Lastly, because LIFEPOINT 017984-017990 is protected by the attorney-client privilege, it is not necessary to analyze the application of the work product doctrine.

**Plaintiff's Second Motion To Compel – Premium Calculation Information Discoverable In Part**

It is ORDERED that *Plaintiff's Second Motion To Compel* is granted with respect to Steadfast Document Bates Nos: AEO STEAD004955-004958; AEO STEAD004959-004962; AEO STEAD001700-001711; AEO STEAD004584-004585; AEO STEAD003990-003992, and unredacted copies of these documents shall be produced by the Defendant by noon on Monday, August 28, 2017.

The reason for the production is that after conducting the *in camera* inspection, the Court finds that these documents are relevant and are calculated to lead to the discovery of admissible evidence in consideration of Steadfast's underwriting guidelines that authorized underwriters to issue surcharges in a certain range. That, in turn, could reveal the exposure the underwriters' anticipated which could have a bearing on the textual

ambiguity of the Healthcare Policy in this case. The documents to be produced also could lead to the discovery of admissible evidence on the disputed fact whether and when the Plaintiff was offered the Related Medical Incident endorsement. That as well could factor into whether or not one party's interpretation of the Policy prevails over the other side's interpretation. For these reasons, the Defendant's objection to production on the basis of relevancy is denied. Also, with the Protective Order in place in this case, the confidentiality of the documents is preserved.

With respect to Steadfast Privileged Documents Nos. PRIV00001-00042; PRIV000112; and PRIV000113 their production is denied. From the *in camera* inspection the Court finds these documents are not calculated to lead to the discovery of admissible evidence.

s/ Ellen Hobbs Lyle  
ELLEN HOBBS LYLE  
CHANCELLOR  
BUSINESS COURT DOCKET  
PILOT PROJECT

cc by U.S. Mail, email, or efilng as applicable to:

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