

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

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UNITED HERITAGE PROPERTY AND
CASUALTY COMPANY, an Idaho
corporation,

NO. CIV. 1:10-456 WBS

Plaintiff,

MEMORANDUM AND ORDER RE:
MOTIONS TO COMPEL AND TO
QUASH

v.

FARMERS ALLIANCE MUTUAL
INSURANCE COMPANY, a foreign
corporation,

Defendant.

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Plaintiff United Heritage Property and Casualty Company ("United Heritage") brought this action against defendant Farmers Alliance Mutual Insurance Company ("FAMI"), arising out of FAMI's refusal to accept United Heritage's tender of an insurance-related suit. Presently before the court are two motions by third parties to quash subpoenas and FAMI's motion to compel production.

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1 I. Factual and Procedural Background

2 On April 10, 2003, the minor daughter of Connie and
 3 Fabricio Zarate fell into a stairwell and suffered injuries at an
 4 apartment leased to the Zarates by the owners, the Beddes family
 5 and their partnership ("Beddes defendants"). (Compl. ¶¶ 8, 10
 6 (Docket No. 1).) The Beddes defendants were insured by FAMI.
 7 (Id. ¶ 12.) At the time of the accident, the apartment was
 8 managed by Rentmaster under a Property Management Agreement with
 9 the Beddes defendants. (Id. ¶ 9.)

10 The Zarates filed a claim with FAMI for damages against
 11 the Beddes defendants, who settled the claim for \$300,000.00.
 12 (Id. ¶¶ 11-12.) The Release and Settlement Agreement drafted by
 13 FAMI released FAMI and the Beddes defendants but expressly
 14 reserved all claims the Zarates may have had against Rentmaster:

15 This release is not intended to release any other
 16 tortfeasor . . . and is specifically intended to exclude
 17 and does hereby exclude Rentmaster of Rexburg, any of its
 18 owners, or assigns as possible tortfeasor in this matter
 19 of Releasors. Such claims are specifically reserved and
 20 are not compromised or released by his [sic] document.

21 (Id. ¶ 13 (emphasis omitted).)

22 On April 4, 2006, Connie Zarate filed a lawsuit against
 23 Rentmaster for negligence ("Zarate litigation"). (Id. ¶ 15.)
 24 Rentmaster then filed a third-party complaint against the Beddes
 25 defendants. (Id. ¶ 16.)

26 Rentmaster, which had an insurance policy with United
 27 Heritage, tendered the defense and indemnity of the Zarate
 28 litigation to United Heritage, and United Heritage accepted.
 (Id. ¶¶ 20-21.) United Heritage alleges that it made numerous
 requests of FAMI for a copy of the Beddes defendants' insurance

1 policy. (Id. ¶¶ 17-19.) United Heritage eventually received a
2 copy of the FAMI policy and discovered a provision stating that
3 an "insured" includes "any organization while acting as your real
4 estate manager." (Id. ¶ 22.)

5 This provision, United Heritage asserts, means that
6 FAMI was the primary insurer not only for the Beddes defendants
7 but also for Rentmaster. (Id. ¶ 19.) Accordingly, United
8 Heritage and Rentmaster attempted to tender the defense of the
9 Zarate litigation to FAMI and demanded a refund of attorney's
10 fees and costs incurred and payment of any indemnity required to
11 be paid by United Heritage in order to protect Rentmaster, but
12 FAMI declined. (Id. ¶ 24.) The parties stated at the hearing on
13 these motions that the Zarate litigation has settled for the
14 policy limit of \$500,000.00.

15 United Heritage then filed this lawsuit against FAMI,
16 alleging claims for subrogation, breach of duty to defend, breach
17 of duty to indemnify, bad faith, intentional infliction of
18 emotional distress, fraud, unjust enrichment, and declaratory
19 judgment.

20 **II. Discussion**

21 **A. Breck Barton's Motion to Quash**

22 Breck Barton, attorney for the Zarates, moves to quash
23 United Heritage's subpoena to produce documents relating to
24 Barton's representation of the Zarates. (Docket No. 20.) Barton
25 has already produced some of the documents, but moves to quash
26 the subpoena as to those documents he believes are privileged.
27 See Fed. R. Civ. P. 45(c)(3)(A). United Heritage does not oppose
28 the motion. Accordingly, the court will grant Barton's motion to

1 quash.

2 B. Beddes Defendants' Motion to Quash

3 Plaintiff's attorney, who so zealously opposes
4 discovery of his own client's billing records on the ground that
5 they are protected by the attorney-client and work product
6 privileges, seeks with equal zeal to discover the entire file of
7 the Beddes defendants' attorney, Jeffrey Thomson, in the Zarate
8 litigation. The incongruity has not escaped the notice of the
9 court. Presently before the court is the Beddes defendants
10 motion to quash that subpoena.

11 It appears that some or all of the requested documents
12 were the subject of a previous Order of the court, (see Mar. 23,
13 2011, Order (Docket No. 39)), but because those documents were
14 reviewed in camera by another judge, the court cannot be certain.
15 Nor can this court discern which documents may have been found
16 discoverable and which were not. Mr. Thomson represented to the
17 court that the documents were different and that the motion to
18 quash is not moot. Counsel for the Beddes defendants did not
19 appear at the hearing. Accordingly, the court must consider the
20 motion on its merits.

21 The Beddes defendants have made no showing regarding
22 the documents they believe to be privileged, such as by providing
23 a privilege log. "A person withholding subpoenaed information
24 under a claim that it is privileged . . . must . . . describe the
25 nature of the withheld documents, communications, or tangible
26 things in a manner that, without revealing information itself
27 privileged or protected, will enable the parties to assess the
28 claim." Fed. R. Civ. P. 45(d)(2)(A). Accordingly, the motion

1 will be denied without prejudice. The Beddes defendants may
2 reassert the motion if, for example, they wish to specify the
3 documents protected by privilege.

4 C. FAMI's Motion to Compel

5 FAMI moves to compel production of attorney invoices
6 showing fees incurred by attorneys for United Heritage in the
7 Zarate litigation. (Docket No. 40.) United Heritage seeks in
8 its Complaint to recover those fees from FAMI. Redacted invoices
9 previously produced by United Heritage do not reveal which
10 attorney provided the service or what service was provided.
11 (See Mot. to Compel Ex. C (Docket No. 40-2).) It is unclear how
12 production of the redacted portions of those invoice could
13 possibly prejudice plaintiff in any way. Nevertheless, plaintiff
14 steadfastly takes the position that they are protected by the
15 attorney-client and work product privileges.

16 Because this case arises under the court's diversity
17 jurisdiction, attorney-client privilege is governed by Idaho law.
18 See Fed. R. Evid. 501. When the state supreme court has not
19 addressed an issue, the court "look[s] to other state-court
20 decisions, well-reasoned decisions from other jurisdictions, and
21 any other available authority to determine the applicable state
22 law." Burns v. Int'l Ins. Co., 929 F.2d 1422, 1424 (9th Cir.
23 1991); see Truckstop.Net, L.L.C. v. Sprint Commc'n Co., Nos. CV-
24 04-561, CV-05-138, 2007 WL 2480001, at *5 (D. Idaho Aug. 29,
25 2007) ("The Court finds no Idaho precedent as to [subject matter
26 waiver]. The Ninth Circuit has addressed this issue in two
27 cases. The Court adopts Ninth Circuit precedent as Idaho law in
28 making its determination as to the subject matter waiver

1 issue.").

2 Idaho courts have not addressed whether communications
3 regarding fees are protected by the attorney-client privilege.
4 Under Ninth Circuit law, communications between attorney and
5 client that concern "the identity of the client, the amount of
6 the fee, the identification of payment by case file name, and the
7 general purpose of the work performed are usually not protected
8 from disclosure by the attorney-client privilege." Clarke v. Am.
9 Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992). However,
10 "correspondence, bills, ledgers, statements, and time records
11 which also reveal the motive of the client in seeking
12 representation, litigation strategy, or the specific nature of
13 the services provided, such as researching particular areas of
14 law, fall within the privilege." Id.

15 United Heritage represents that the requested invoices
16 fall within the privilege because they reveal the specific nature
17 of the services provided. The court has reviewed the redacted
18 documents, and notes that what is missing from the documents is
19 that which is most essential to a bill: a short description of
20 the work performed. Such a bill, without redactions, is
21 precisely the type of document that attorneys expect to turn
22 over, and routinely do turn over without objection, whenever they
23 expect to recover attorney's fees. The court does not understand
24 why United Heritage believes this case to be any different.
25 However, the court need not decide whether the documents are in
26 fact privileged under Clarke because, unlike the documents United
27 Heritage's counsel seeks to subpoena from the Beddes defendants,
28 the privileges have clearly been waived with respect to the

1 information sought here.

2 Under Idaho law, a privilege is waived when the holder
3 of the privilege "voluntarily discloses or consents to disclosure
4 of any significant part of the matter or communication." Idaho
5 R. Evid. 510. Waiver is based on the principle that "the
6 attorney-client privilege is a defensive shield and not an
7 offensive sword." Skelton v. Spencer, 98 Idaho 417, 420 (1977);
8 see Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003).
9 Under Idaho law, "as at common law, the 'consent' of the client
10 to the disclosure of confidential communications may be either
11 express or implied from the conduct of the client. When the
12 'consent' of the client is found, the privilege is said to have
13 been 'waived.'" Skelton, 98 Idaho at 419 (citations omitted).
14 Idaho courts have not squarely addressed whether putting
15 information at issue in a case amounts to a waiver. But see id.
16 at 421 ("By testifying to privileged communications, and by
17 making an issue of her defense the privileged matter of her
18 relation with her former attorneys, appellant Louise Spencer
19 waived the attorney-client privilege for all communications
20 relevant to the settlement process and the conduct of her former
21 attorneys."). Accordingly, the court looks to other
22 jurisdictions to determine whether United Heritage has waived the
23 privilege.

24 The Ninth Circuit has held that "parties in litigation
25 may not abuse the [attorney-client] privilege by asserting claims
26 the opposing party cannot adequately dispute unless it has access
27 to the privileged materials." Bittaker, 331 F.3d at 719. Thus,
28 "[t]he party asserting the claim is said to have implicitly

1 waived the privilege." Id. Under both state and federal law, an
2 implied waiver of the attorney-client privilege occurs when "(1)
3 the party asserts the privilege as a result of some affirmative
4 act, such as filing suit; (2) through this affirmative act, the
5 asserting party puts the privileged information at issue; and (3)
6 allowing the privilege would deny the opposing party access to
7 information vital to its defense." Home Indem. Co. v. Lane
8 Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995) (citing
9 Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975));
10 see Terrebonne, Ltd. of Cal. v. Murray, 1 F. Supp. 2d 1050, 1059
11 (E.D. Cal. 1998) (Wanger, J.) ("Under California law, the
12 attorney-client privilege is waived when the client . . . places
13 'in issue' the contents of the communication with its
14 attorney.").

15 The Hearn factors are met here. United Heritage
16 asserts the privilege after having filed suit against FAMI, which
17 put the attorney's fees, in the form of damages, at issue. FAMI
18 needs access to the billing records to be able to defend itself
19 against double billing, inaccurate calculations, wrongly
20 allocated hours, unreasonable rates, or any other
21 inconsistencies. Accordingly, United Heritage has implicitly
22 waived its attorney-client privilege relating to the records.

23 The work-product doctrine's protections are also
24 waivable. United States v. Richey, 632 F.3d 559, 567 (9th Cir.
25 2011); see Truckstop.Net, 2007 WL 2480001, at *5 (the work-
26 product doctrine is governed by federal law). The Bittaker rule
27 "applies equally to the work product privilege, a complementary
28 rule that protects many of the same interests [as the attorney-

1 client privilege]." Bittaker, 331 F.3d at 722 n.6. Accordingly,
2 the court will grant FAMI's motion to compel production.

3 IT IS THEREFORE ORDERED that:

4 (1) Breck Barton's motion to quash subpoena be, and the same
5 hereby is, GRANTED;

6 (2) The Beddes defendants' motion to quash subpoena be, and
7 the same hereby is, DENIED without prejudice; and

8 (3) FAMI's motion to compel be, and the same hereby is,
9 GRANTED.

10 DATED: July 26, 2011

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12 WILLIAM B. SHUBB
13 UNITED STATES DISTRICT JUDGE

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