IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:	)	Chapter 12 Case
	)	Number 87-60028
LANNIE S. JARRELL	)	
	)	
Debtor	)	
	)	
WILLIAM R. SCOTT, JR.	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 88-6011
LANNIE S. JARRELL AND	)	
FIRST UNION BANK OF SCREVEN	)	FILED
COUNTY	)	at 1 O'clock & 56 min. P.M.
	)	Date: 10-10-89
Defendants	)	

ORDER

This order represents the latest effort by this court to resolve a continuing discovery dispute between the parties. By previous order dated March 23, 1989, this court overruled the objections of defendant First Union Bank of Screven County ("First Union") to the requests by plaintiff for production of documents and ordered First Union to produce the documents requested in Plaintiff's request dated April 8, 1988. In response to that order, First Union produced copies of the minutes of the Board of Directors meetings of First Union held in 1983 and 1984, as per

plaintiff's

initial request for production. Plaintiff insists upon production of the minutes from 1983 forward as required by the March order. First Union contends that it has complied with the request. While technically correct in its compliance, the order of March 23, 1989, provided: "4. Minutes of the Board of Directors meetings of First Union during the time period from 1983 forward." For the reasons set forth in the order of March 23, 1989, Defendant, First Union, is hereby ordered to comply with the discovery request and produce minutes of the Board of Directors meeting of First Union during the time period 1983 forward. Production shall occur on or before October 24, 1989, under the same terms and conditions as set forth in the order of March 23, 1989.

The remainder of the current dispute centers around the ordered production of "documents relating to insurance claims filed by First Union with the Continental Insurance Companies which documents relate to insurance claims filed by First Union with its insurance carrier, the Continental Insurance Company, to recover losses resulting from the conduct of W. Thomas Millican, III." Plaintiff contends that this ordered discovery extends to documents contained in the file of First Union's attorneys that handled the claim on its behalf against Continental and

specifically requests "correspondence and settlement negotiations between Continental Insurance Company, First Union and/or their attorneys." Other than the settlement agreement itself, First Union contends that all

correspondence between attorneys for First Union and Continental or its attorneys constitutes work product of the lawyers representing First Union and as such are beyond the production requirements of the previous order of this court and Bankruptcy Rule 7026 (Federal Rule of Civil Procedure 26 hereinafter "Rule 26"). In addition to its latest objection to production, First Union's response proposes a compromise which states:

> D. A Compromise effort.
> The Bank's attorney had insisted that his correspondence with representatives of Continental Insurance Company were protected from discovery because they contain evidence of his strategy to achieve a favorable outcome for his client in the negotiations with the insurance company. Recent additional discussions between the Bank's counsel and the Bank's attorney in the insurance negotiations have resulted in the following suggested compromise. The Bank's attorney has produced copies of correspondence between agents or representatives of the Bank and the insurance company and its representatives which he could find in his litigation file against the insurer. The Bank's attorney requested that information containing thoughts, opinions, strategies and positions of the Bank's attorney or other representative be blacked out and copies thereof be turned over to Plaintiff's attorney in their altered state. Defendant's counsel

> is providing the court with the original documents as well as with their altered duplicates for the court's review in camera. The Bank hereby requests the court to approve the production of the altered copies to Plaintiff. The Bank believes that these steps it has taken would serve to protect material which is not subject to discovery, and at the same time help resolve the present discovery dispute.

This court finds the proposed compromise unacceptable. First Union proposes that its counsel involved in the settlement of its dispute with Continental inspect his own file and produce the documents counsel deems pertinent to First Union's counsel in this litigation for an in-camera review by this court prior to production. There is no certification by counsel in this litigation that the documents being produced represent all the correspondence and written evidence of negotiations between First Union and Continental. In addition, this court has reviewed the documentation designated "unaltered" and has determined that in fact some of the documents appeared altered or incomplete.

Regarding the work product objection, the objection is without merit. The procedures for resolving a work product discovery objection are set forth in Rule 26(b)(3). The burden is upon the objecting party to first establish that the material requested does fall within the work product exception, and having done so, the burden then shifts to the party seeking discovery to establish substantial need for the materials in the preparation of

that party's case, and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 8 C. Wright & A. Miller, Federal and Practice Procedure §2023; Lott v. Seaboard Systems Railroad, 109 F.R.D. 554 (S.D. Ga. 1985). In the present matter, First Union has failed to establish that the material requested falls within the work product exception

of Rule 26(b)(3). Whether the material requested is work product requires a showing by the objecting party that the materials are: 1) documents and tangible things; 2) prepared in anticipation of litigation or for trial; and 3) by or for another party or by or for that party's representative. 8 C. Wright & A. Miller, Federal and Practice Procedure §2024; Lott, supra. Implicit in the work product exception is the concept that the material meeting the definition of work product was prepared in confidence and for internal use. See Advisory Committee Notes to 1970 Amendments to Federal Rule of Civil Procedure 26.

In the present case, plaintiff does not seek any material prepared in confidence for internal use by counsel for defendant First Union in its dispute with Continental Insurance Company. To the contrary, the plaintiff seeks written communications between the adversaries. As stated in the previous order of March 23, 1989, "Scott's [plaintiff] desire to obtain

the documents is easily determined. Scott hopes to discover admissions against interest by First Union establishing attorney Millican as an agent or employee of the Bank. As this court previously noted, the question of Millican's relationship with the Bank in all probability will affect directly the outcome of this adversary proceeding. Any information which will establish an agency or employee relationship, or lack of such a relationship, would be useful." While communications between counsel for First Union and counsel for Continental Insurance

Company may in fact contain mental impressions, opinions conclusions formulated by First Union's counsel, it is inconceivable that these communications to adverse counsel were prepared in confidence for internal use. What has been requested by the plaintiff in this case is no more excepted from discovery by a work product exception than pleadings filed by litigants which set forth a plaintiff's theory of recovery or a defendant's theory of defense. Any protected quality granted to the work product of First Union's counsel under Rule 26(b)(3) was lost once that work product, whether impressions, opinions or conclusions of counsel, are communicated to opposing counsel. Once communicated, nothing confidential remains to be protected.

IT IS THEREFORE ORDERED that First Union's objection to production of documents is again overruled. First Union shall, on

or before October 24, 1989, produce all correspondence and written communication in any form including all enclosures transmitted therewith and attachments thereto between First Union, its employees, representatives, agents or attorneys and Continental Insurance Company, its subsidiaries, employees, representatives, agents or attorneys which are in the possession of First Union or through reasonable effort can be obtained by First Union from its current or former employees, attorneys, representatives or agents in any way involving any claim asserted by First Union to recover losses suffered by it from the conduct of W. Thomas Millican, III.

In the event that any current or former employee, attorney, agent or representative of First Union refuses to surrender any of the aforereferenced documents in their possession to First Union's counsel in this proceeding for production within the time prescribed herein, counsel for First Union shall file with this court an~ serve upon opposing counsel herein a response setting forth the name and street address, business and residence if available, of the individual and/or firm upon whom the request was made, the date of the request, the contents of the request, and the contents of their response. Upon the filing of such statement, plaintiff may immediately proceed pursuant to Bankruptcy Rule 9016 and 7026 (Federal Rule of Civil Procedure 45 and 26) for discovery of the requested documentation. See Hickman

v. Taylor, 329 U.S. 496, 504, 675 S.Ct. 385, 390, 91 L.Ed. 451, (1947).

IT IS FURTHER ORDERED that along with service of a copy of this order upon First Union's counsel, the clerk shall return both sets of documents submitted by First Union's counsel in support of its proposed compromise.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 10th day of October, 1989.