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# [***In re Blue Cross Blue Shield Antitrust Litig. (Mdl No. 2406)***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=)

United States District Court for the Northern District of Alabama, Southern Division

July 6, 2017, Decided; July 6, 2017, Filed

Case No. 2:13-cv-20000-RDP

**Reporter**

2017 U.S. Dist. LEXIS 106111 \*; 2017 WL 2889679

IN RE: BLUE CROSS BLUE SHIELD ***ANTITRUST*** LITIGATION (MDL No. 2406)

**Prior History:** [*In re Blue Cross Blue Shield* ***Antitrust*** *Litig., 26 F. Supp. 3d 1172, 2014 U.S. Dist. LEXIS 82795 (N.D. Ala., June 18, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CFY-P721-F04C-P032-00000-00&context=)

**Core Terms**

documents, coverage, Provider, Plans, discovery, work-product, motion to compel, re-insurance, privileged, employees, non-party, releases, entity, professional liability insurance, prior litigation, assessments, themselves, parties, liability insurance, work product, communications, non-privileged, ***antitrust***, subpoenas

**Case Summary**

**Overview**

HOLDINGS: [1]-Given the likelihood that most of the responsive documents relating to Professional Liability insurance coverage would be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighed the potential benefit; [2]-Because documents related to releases executed in prior litigation were likely either work-product protected or irrelevant, the motion to compel was denied as to this category of documents.

**Outcome**

Plaintiffs' motion granted in part and denied in part.

**LexisNexis® Headnotes**

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > Opinion Work Product

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=LNHNREFclscc1)[] **Work Product Doctrine, Opinion Work Product**



While opinion work product enjoys almost absolute immunity, extraordinary circumstances may exist that justify a departure from this protection.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=LNHNREFclscc2)[] **Discovery, Relevance of Discoverable Information**



*Fed. R. Civ. P. 26(b)(1)* defines the scope of discovery as involving any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Whether a particular discovery request is proportional to the needs of the case is weighed against several non-exhaustive factors: the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Fed. R. Civ. P. 26(b)(1)*.

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=LNHNREFclscc3)[] **Discovery, Relevance of Discoverable Information**



[*Fed. R. Civ. P. 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) requires the court and parties to take steps to avoid unnecessary burdens on non-parties. For this reason, discovery sought by [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) from a non-party must be necessary, narrowly focused, and easily responded to without unnecessary burden or expense. Additionally, as [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) is a type of discovery device, discovery requests under it must also comply with the proportionality requirement of *Fed. R. Civ. P. 26(b)(1)*.

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**Judges:** T. MICHAEL PUTNAM, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** T. MICHAEL PUTNAM

**Opinion**

DISCOVERY ORDER NO. 57

The Provider Plaintiffs have filed a motion to compel certain non-parties, BCS Financial Corporation and BCS Insurance Company (collectively "BCS"), to produce documents pursuant to the Plaintiffs' [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) subpoenas *duces tecum*. (Doc. 1235).**[\*16]** On June 23, 2017, Blue Cross Blue Shield of Michigan ("BCBS-MI") and Blue Cross Blue Shield of Alabama ("BCBS-AL") filed their motions to quash the [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) subpoenas to BCS (Docs. 1297 and 1298) to the extent the subpoenas seek privileged or work-product protected documents in which BCBS-MI and BCBS-AL have an interest. On that same day, BCS filed its opposition to the motion to compel production (Doc. 1300). The Provider Plaintiffs filed a response and opposition to the motions to quash on June 28, 2017 (Doc. 1309), and the court heard arguments on the motions on June 29, 2017.

The Provider Plaintiffs and BCS have engaged in a months-long meet-and-confer process that has resulted in some agreements. BCS acknowledges that it has agreed to produce documents related to twenty-three requests for production in the subpoenas, resulting in the actual production (so far) of over 2,300 pages of documents. (Doc. 1300, at p. 8). Nothing in this Order is intended or should be read to alter any agreement the Provider Plaintiffs and BCS have reached for production of documents. BCS and the Provider Plaintiffs should proceed with whatever agreements they have reached.

Beyond such agreements, BCS and the**[\*17]** Provider Plaintiffs agree that six categories of document requests remain in dispute: (1) documents related to Professional Liability ("D&O" and "E&O") coverage provided to Blue Plans by BCS Insurance; (2) documents related to Excess of Loss coverage provided to Blue Plans by BCS Insurance; (3) documents related to Medical Stop Loss insurance provided by BCS Insurance to Blue Plan administrative-services customers; (4) documents related to Group Universal Life insurance provided to Blue Plan employees by 4EL, a subsidiary of BCS Financial; (5) documents related to re-insurance of BCS's Professional Liability coverage by Plans' Liability Insurance Company ("PLIC"); and (6) documents related to prior litigation "that touches on any of the allegations if Provider Plaintiffs' complaint." Provider Plaintiffs argue that documents related to these forms of insurance coverage are relevant to whether a conspiratorial agreement exists among the Blues. BCS contends that the documents are not relevant to such an issue, are burdensome to gather and produce, are largely covered by various privileges and work-product protection, and are disproportional to the needs of this case. BCBS-MI and BCBS-AL**[\*18]** also assert that many documents sought are covered by their attorney-client privilege and work-product protection under *Fed. R. Civ. P. 26*.

As background, it is important to note that BCS is wholly owned by the Blue Plans and the Blue Cross Blue Shield Association ("BCBSA"). The parties debate whether BCS is a "captive" insurance company, although it is undisputed that, while owned by the Blues, BCS sells some forms of insurance to non-Blue entities. Certain types of insurance, however, are exclusively available to the Blues. For example, BCS sells its Medical Stop Loss insurance to self-funded medical plans regardless of whether a Blue Plan provides administrative services to the self-funding entity. On the other hand, Group Universal Life insurance is available only to employees of a Blue Plan, but not all Blue Plans participate in making the insurance available. Similarly, Professional Liability insurance (Directors and Officers coverage and Errors and Omissions coverage) is available only to Blue Plans, but not all Blue Plans participate.

**1. Professional Liability Insurance Documents**

Provider Plaintiffs contend primarily that documents showing the creation of professional liability insurance for the**[\*19]** directors and officers of the Blue Plans and the sharing of risks among the Plans may be evidence of conscious recognition by the Blue Plans that they may be in violation of the ***anti-trust*** laws, and that the insurance is an attempt to protect themselves from the financial consequences of liability.[[1]](#footnote-0)1 BCS, BCBS-MI, and BCBS-AL all point out that most of these documents related to liability insurance coverage are subject to the attorney-client privilege and work-product protection arising in this case. In light of this, the burden and expense of gathering and reviewing the documents and preparing a privilege log for them, BCS contends, is disproportional to the needs of this case. The court agrees.

First, it should be noted that of the thirty-six defendant Plans, BCS is providing D&O or E&O coverage only to seven. The fact that more than three-quarters of the Blue defendants do not rely on BCS liability insurance weakens the argument that the very existence of BCS is evidence of a conspiratorial agreement among the Blues. Why would the Blues create a "captive" insurance company to provide liability insurance against ***antitrust*** allegations and then most of them forgo the coverage? Plaintiffs'**[\*20]** contention that the very existence of the insurance is proof of an ***antitrust*** conspiracy is a stretch.[[2]](#footnote-1)2

Even assuming some relevance can be found, it is clear that for the seven Blues covered, most of the documents relating to the coverage implicate the attorney-client privilege and/or work-product protection. As with any liability-carrier coverage, counsel representing the Blues share with the liability carrier information, opinions, assessments, and strategy related to the covered litigation. Such communications are necessarily "opinion work product," which enjoys almost absolute protection from disclosure. See [*Williamson v. Moore, 221 F.3d 1177, 1182-83 (11th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4118-4D00-0038-X3HJ-00000-00&context=) ([***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=clscc1)[] "While opinion work product enjoys almost absolute immunity, extraordinary circumstances may exist that justify a departure from this protection.") (citing [*Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7270-003B-P4KJ-00000-00&context=). Such opinion work product documents, and attorney-client communications made as part of a joint defense, are almost certainly never subject to the discovery.



Finally, to the extent that other documents might exist that are not shielded by these privileges, searching for them among the greater volume of privileged documents is disproportionate to the needs of this case. [***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=clscc2)[] *Rule 26(b)(1)* defines the scope of discovery as involving "any nonprivileged**[\*21]** matter that is relevant to any party's claim or defense and *proportional to the needs of the case*..." (italics added). Whether a particular discovery request is "proportional to the needs" of the case is weighed against several non-exhaustive factors: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Fed. R. Civ. P. 26(b)(1)*. Here, given the likelihood that most of the responsive documents relating to Professional Liability insurance coverage will be subject to some privilege or work-product protection, the burden and expense of searching for the remaining non-privileged responsive documents outweighs the potential benefit. Also, whether some Blues have liability insurance proved by a Blue-owned company is relatively unimportant to the issues in this case. The fact that the Blues may have created BCS to provide liability insurance coverage says little about whether that was motivated by fear of ***antitrust*** litigation as opposed to many other forms of liability**[\*22]** that might be covered by D&O and E&O insurance. The tangential value of this discovery is outweighed by the burden and expense required of BCS, a non-party, to gather review and produce documents not covered by a privilege.[[3]](#footnote-2)3



The same reasoning applies to the Provider Plaintiffs' request for documents related to PLIC's re-insurance of BCS's Professional Liability coverage, the sixth category of documents at issue in this case. As the re-insurer of potential liability, PLIC also would receive reports and assessments of the case that are almost certainly privileged or work-product protected. The Provider Plaintiffs are entitled only to information identifying which Blue Defendants have Professional Liability coverage by BSC for which PLIC provides re-insurance, and at what level of coverage.

The motion to compel is GRANTED, therefore, to the limited extent that BCS shall, within thirty (30) days, produce such documents as may be necessary to identify which Blue Plans have Professional Liability coverage with it. BCS is ORDERED to produce an exemplar policy or contract showing its current Professional Liability coverage for each Blue Plan having such coverage, including the policy limits**[\*23]** of such coverage. Further, BCS is ORDERED to produce such documents only as are necessary to show which of the Blues' current D&O and E&O coverages in this case are re-insured by PLIC and the limits of the coverage (e.g., the level of loss at which the re-insurance is triggered and the maximum limit of coverage). Otherwise, the Provider Plaintiffs' motion to compel the production of documents related to Professional Liability insurance coverage is DENIED. To the extent that BCBS-MI and BCBS-AL seek to quash production of privileged or work-product protected documents related to Professional Liability insurance, the motions are MOOT.

**2. Plan Excess of Loss Documents**

A second category of documents sought by the Provider Plaintiffs relates to BCS's Plan Excess of Loss coverage. This is a medical stop-loss insurance offered only to Blue Plans. Although the Plan Excess of Loss coverage is offered only to Blue Plans, no Blue Plan is *required* to carry the coverage, and of the defendants in this action, only five have done so.[[4]](#footnote-3)4 The coverage is claim specific, meaning that to covers excess expenses a Blue may incur while providing medical-insurance coverage for a specific claim. As BCS describes**[\*24]** it, "when the insured [a Blue Plan] hits a certain level of loss (for each specific claim), the Plan Excess of Loss product will reinsure the risk above that loss." (Doc. 1300, at p. 6). Provider Plaintiffs contend that this document discovery is relevant to whether the size of the Blues' reserves against medical loss are correctly calculated (or, alternatively, inflated) as there is insurance available to cover excess loss.

As the court has discussed before, [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P0F-VCG1-F04C-P2TP-00000-00&context=&link=clscc3)[] [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) requires the court and parties to take steps to avoid unnecessary burdens on non-parties. For this reason, discovery sought by [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) from a non-party must be necessary, narrowly focused, and easily responded to without unnecessary burden or expense. Additionally, as [*Rule 45*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02J-00000-00&context=) is a type of discovery device, discovery requests under it must also comply with the proportionality requirement of *Rule 26(b)(1)*. The court agrees with BCS that this discovery can best be obtained most efficiently from the five defendants who carry the coverage. Because only five Blue Plans have this coverage (at least as provided by BCS; perhaps others have similar coverage from other carriers), it is not necessary to seek discovery of all documents related to Plan Excess of Loss**[\*25]** coverage when the relevant information can be obtained from the five defendant Plans that use it. Plaintiffs' theory of the discovery need—that having this insurance obviates the need for large medical reserves—requires only information that can be obtained from the parties using the insurance. Those Plans with the Excess of Loss coverage should be able to identify the extent of the coverage they have, how often claims have been made for the insurance and in what amounts, and if or how this coverage impacts the calculation of their reserves. It is, therefore, ORDERED that BCS produce within thirty (30) days such documents only as necessary to identify the five defendant Blues currently with this coverage. The motion to compel is otherwise DENIED.



**3. Medical Stop Loss Insurance Documents**

Many employers "self-fund" the costs of medical care coverage for their employees while hiring a third-party administrator to handle the claims processing. BCS offers Medical Stop Loss insurance to such self-funders whether or not the entity engages a Blue Plan to perform the administrative services. That insurance is not marketed under any license from a Blue entity, and it is not marketed under a Blue**[\*26]** brand. The insurance is independently licensed by ***regulators*** in each State.

Because this is insurance offered to non-party, non-Blue entities, it is not at all clear how it is relevant to any claim or defense in this action. Provider Plaintiffs argue that, because BCS sells this insurance in many if not all States, it calls into question whether the Blue business model of exclusive service areas is really necessary. But this ignores the fact (not really disputed by the Provider Plaintiffs) that Medical Stop Loss insurance is not sold under any license from a Blue entity or marketed under a Blue brand. More so, the comparison of the market for this type of insurance to the market for health insurance is apples and oranges. The manner in which BCS sells Medical Stop Loss insurance says little about how medical insurance can be sold. The motion to compel is DENIED.

**4. Group Universal Life Insurance Documents**

The Provider Plaintiffs also seek production of documents related to Group Universal Life insurance sold to Blue Cross employees by 4EL, a subsidiary of BCS. They assert that they suspect that this insurance is form of compensation for Blue executives, despite BCS's assertion that it**[\*27]** is made available to all Blue employees and paid for by the employees themselves.[[5]](#footnote-4)5 Of course, the primary source for information about whether a benefit is offered to Blue executives as part of their compensation is the Blues themselves. Nonetheless, obtaining actual copies of group policies may be difficult. Therefore, the motion to compel is GRANTED only to the limited extent that BCS (or its subsidiary 4EL) shall produce within thirty (30) days a copy of any and all policies or contracts under which the *current* CEOs of the respective Blue entities have Group Universal Life insurance issued by BCS or its subsidiaries currently in force. The motion is otherwise DENIED.

**5. Prior Litigation Documents**

Finally, the Provider Plaintiffs also seek a somewhat vague collection of documents "related to communications between BCS and Defendants and internal BCS discussions regarding the impact of the releases from prior litigation for the purpose of assessing Defendants' defenses." (Doc. 1235, p. 11). To the extent that any of the current named Provider Plaintiffs or potential members of a Providers class executed releases in prior litigation with BCS, those plaintiffs certainly already have copies**[\*28]** of them. What Provider Plaintiffs are seeking are the "communications" between BCS and the Blue Defendants and, further, BCS's own internal assessment of the impact such releases may have in the instant case. Such discussions and assessments, however, seem to the court to be exactly the type of opinion work product protected by *Rule 26* in that such materials would reflect the legal opinions and strategies of the Blue Defendants. While these assessments of the Blues, expressed in communications among themselves and with BCS Insurance, concerning the tactical or strategic value of prior-litigation releases might be informative, they are also their protected work product. On the other hand, if such materials are only the internal assessments of BCS itself, a non-party in the instant case, they are irrelevant. What difference does BCS's opinion about the usefulness of releases from prior litigation make in this case? The internal opinions of BCS about the tactical or strategic value of releases to the Blue Defendants in this case are not significantly more meaningful than the opinions of Stephen Colbert or Donald Trump on the subject. Thus, because documents related to releases executed in prior**[\*29]** litigation are likely either work-product protected or irrelevant, the motion to compel is DENIED as to this category of documents.

DONE this 6th day of July, 2017.

/s/ T. Michael Putnam

T. MICHAEL PUTNAM

UNITED STATES MAGISTRATE JUDGE

**End of Document**

1. 1At page seven of their motion, the Provider Plaintiffs assert, "Given that Provider Plaintiffs' central claims are that Defendants have conspired to allocate markets and fix prices, documents related to any attempt by Defendants to form a captive insurance company to protect themselves against potential liability stemming from ***antitrust*** violations implicate conspiracy questions and whether Defendants were aware of potential wrongdoing and liability." (Doc. 1235, at 7). Insofar as they argue that this information is needed to determine whether the Blues can cover any judgment against them, the Provider Plaintiffs can obtain discovery concerning the nature and extent of liability insurance available to cover a judgment from the defendants themselves. Indeed, ***Fed. R. Civ. P. 26(a)(1)*** requires disclosure of such liability-insurance coverage. There is no need to seek the information from a non-party. [↑](#footnote-ref-0)
2. 2BCS has represented to the court that it has produced documents of a historical nature, reflecting the history of the creation and operation of the subpoena targets. [↑](#footnote-ref-1)
3. 3Requiring BSC to produce only non-privileged documents does not reduce the burden and expense. In order to identify responsive non-privileged documents, BCS would still be required to gather, review, and separate non-privileged from privileged documents. This still requires a review of almost every document, even though only a relative few would be produced. [↑](#footnote-ref-2)
4. 4The defendant in the streamlined case, BCBS-AL, is not a Plan that carries this coverage. [↑](#footnote-ref-3)
5. 5It appears to be undisputed that the defendant in the streamlined case, BCBS-AL, does not offer this insurance to any of its employees. [↑](#footnote-ref-4)