

Can Expert Statements Inadvertently Waive Protection?



by [Maggie Tamburro](#)

Talk about pre-trial expert issues that can cause heartburn . . . try these on for size: When are opinions held by a non-testifying expert discoverable by an opposing party, and, if protected, can statements made to an opposing party operate to waive that protection?

In a June 5th decision on a motion to compel discovery of an opposing party's non-testifying expert, a federal district court in Iowa has issued a ruling addressing these sticky issues in a breach of implied warranty and breach of contract case.

If you don't typically see a lot written on these expert issues, that's hardly a surprise. The issues are complicated and can give way to confusion and in some cases disagreement among courts, as aptly noted in this decision. However, sticking one's head in the sand could result in landing you on the wrong side of an adverse expert ruling.

The Case

The suit involved allegations that the defendant, a New York manufacturing company, supplied plaintiff with defective products, which plaintiff used to rebuild automotive products which it then sold to end consumers.

Plaintiff filed suit in 2012, and later that year the court allowed defendant to add a third-party claim against another entity, based on claims that defendant should be allowed recovery for contribution or indemnity if certain products were found to be defective.

In April of this year plaintiff filed a motion to compel, seeking discovery of opinions held by the defendant's expert, a professional engineer with a B.S. and M.S. in metallurgical and materials engineering, who, at defendant's behest, allegedly made a trip to plaintiff's place of business in 2009.

The Expert Visit

During the visit, the expert allegedly met with plaintiff's CEO and defendant's insurer and examined products supplied by defendant which were at issue in the case.

According to an affidavit filed in support of plaintiff's motion to compel, plaintiff's CEO alleged that, during that visit, the expert "verbally informed me that he agreed with my

assessment that the bearings and friction paper sold to [plaintiff] by [defendant] were defective and were the cause of the damage not only to the torque converters but also to the transmissions to which the torque converters were attached.”

The plaintiff’s CEO also allegedly stated in his affidavit that, following the expert’s visit, the CEO had received a phone call from an adjuster with defendant’s insurer, who “read to me portions of the [expert’s] report indicating [the expert’s] opinion that the bearings and friction paper were defective and were the cause of the loss and damage to [plaintiff] and to its customers.”

Defendant didn’t identify the expert who made the 2009 trip to plaintiff’s place of business as one it intended to call at trial, effectively keeping the expert’s opinions from being discoverable under the premise that he was a consulting, not a testifying expert.

Plaintiff had other ideas, however. Based in part on its theory that the expert’s statements to plaintiff’s CEO waived discovery protection provided under FRCP 26, plaintiff tried to convince the court that it should be allowed to take the deposition of the defendant’s expert anyway.

The Expert Issues

At issue in plaintiff’s motion were (1) whether the opinions of the defendant’s expert, who had not been designated as a testifying witness, were discoverable, and (2) if the expert’s opinions were *not* discoverable, did statements allegedly made by the expert operate as a waiver of any applicable discovery protection or privilege?

Touchy Topics

In its ruling, the court hit on two touchy topics.

1. When, if ever, are opinions held by an expert, who has been retained but not designated as a testifying witness, discoverable by an opposing party?

Generally speaking, FRCP 26(b)(4)(D) protects from discovery by an opposing party facts known or opinions held by a non-testifying expert retained in anticipation of litigation, who is not expected to be called as a witness at trial.

However, FRCP 26 allows for certain discovery of non-testifying experts upon a showing of “exceptional circumstances” – if it is “impracticable for the other party to obtain facts or opinions on the same subject by other means” – which the party seeking such discovery bears the burden of showing.

Noting that a premise of the rule protecting an opposing a party’s consulting expert from discovery is fairness and, quoting the S.D. of New York, “allowing counsel to obtain the expert advice they need . . . without fear that every consultation with an expert may yield grist for the adversary’s mill,” the court found no such exceptional circumstances here.

Plaintiff could gain equivalent information through its own experts and had, in fact, retained an expert who it intended to call at trial.

The court also noted the absence of facts other courts have found demonstrative of exceptional circumstances – for example changed conditions that would prevent a first-hand observation by more than one party’s expert. But the court differentiated the case here, stating, “There are no circumstances preventing [plaintiff’s] expert from examining the parts first hand and thereby acquiring the same information gathered by [defendant’s expert].” Therefore, plaintiff failed to establish the requisite “extraordinary circumstances” under FRCP 26 needed to depose defendant’s non-testifying, consulting expert.

With that question behind it, the court ventured on to a more vexing issue.

2. Did statements made by defendant’s expert operate as a waiver of discovery protections afforded a non-testifying expert under 26(b)(4)(D)?

Plaintiff asserted that the statements made by defendant’s expert and defendant’s insurer waived discovery protections afforded non-testifying experts under FRCP 26(b)(4)(D).

The court recognized that whether statements made to third parties can act to waive the privilege is not well-settled, stating, “It is unclear . . . whether the waiver doctrine applies to Rule 26(b)(4)(D).”

Interestingly, some courts have determined that when a party’s non-testifying expert is protected under FRCP 26(b)(4)(D), that protection is *not* subject to waiver. Here the court cited a decision out of the E.D. of Pennsylvania which concluded that, because FRCP 26(b)(4)(D) stems from fairness concerns – not the work product doctrine – the question of whether a party has waived discovery protections with regard to a non-testifying expert was irrelevant.

However, the court cited instances where other federal courts have suggested exactly the *opposite* – that the protections under FRCP 26(b)(4)(D) can, in fact, be waived (citing a case out of the N.D. of Indiana, which noted that courts have found waiver “when the holder of a privilege ‘voluntarily discloses . . . any significant part of the privileged matter’”).

The court here concluded that defendant did *not* waive the discovery protection under FRCP 26(b)(4)(D), stating, “It appears dubious that the waiver doctrine applies to the protections afforded to facts known or opinions held by non-testifying consulting experts.”

Regardless, the court found an escape hatch from further debate on the issue when it aligned itself with courts that have rejected waiver arguments based on actions taken by those who are not a “holder of the privilege” – the holder here being the *defendant*, not the defendant’s *expert*.

In doing so, the court made a crucial distinction: In this instance the *party* didn't make the disclosures, rather, the party's *expert* and *insurer* made the disclosures. The court concluded, "These disclosures do not constitute a waiver of the protections of Rule 26(b)(4)(D) because only [defendant], as holder of the protections, could waive them."

In the end, the court decided that the opinions held by defendant's non-testifying, consulting expert were not discoverable under any of the plaintiff's theories.

The citation to the Order Regarding Motion to Compel is [*Precision of New Hampton, Inc. v. Tri Component Products Corp.*](#), No. C12-2020 (N.D. Iowa, June 5, 2013).

Do you agree with this court's ruling?

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