

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LESLIE ITZENSON, as guardian : CIVIL ACTION  
of minor ALISON PAIGE DEPHILLIPO:  
:  
v. :  
:  
HARTFORD LIFE AND ACCIDENT :  
INSURANCE COMPANY : NO. 99-4475

MEMORANDUM ORDER

This is an ERISA action to recover benefits under an employee benefit plan administered by defendant which denied plaintiff's claim. Plaintiff's decedent, Bruce DePhillipo, was killed when a motorcycle he was operating collided with a tree. His blood alcohol content was double the legal limit for operating a motor vehicle in Pennsylvania. The case essentially turns on the reasonableness of defendant's interpretation of the term "accidental" under the plan. Plaintiff's ability to withstand summary judgment may depend on whether she can produce evidence to show that defendant interpreted this term inconsistently in making other benefit determinations. The parties have persisted past the point of reason in a discovery dispute in connection with plaintiff's desire to obtain such evidence.

Presently before the court is plaintiff's Motion for an Order Pursuant to Fed. R. Civ. P. 37(b)(2)(A). Plaintiff seeks an order deeming to be established as a fact that defendant has inconsistently interpreted the key term by paying claims within the two years prior to Mr. DePhillipo's death to survivors of

persons killed while operating motor vehicles when intoxicated. Plaintiff asserts that she has been unable to establish whether this proposition is true or untrue because defendant has failed to provide discovery in a manner consistent with the court's memorandum order of October 6, 2000. A review of the exhibits submitted with plaintiff's motion suggests otherwise.

Plaintiff had sought to depose a corporate designee of defendant pursuant to Fed. R. Civ. P. 30(b)(6). The court extended the discovery deadline to November 17, 2000 and directed defendant to produce an appropriate designee. Defendant identified a designee, Jen Barnes, and offered to make her available for deposition at any time between October 27th and November 17th except for one day, November 15th. Defendant advised plaintiff that upon reasonable notice, Ms. Barnes would cancel any other commitments to be available for deposition. There is no indication that plaintiff ever availed herself of the opportunity to take this deposition.

The court directed defendant to identify and produce, insofar as possible, claims files involving the grant or denial of death benefits in cases where a covered individual was killed when operating a motor vehicle while intoxicated. Defense counsel advised plaintiff's counsel on October 27, 2000 that defendant's claims files are maintained in a manner which makes it impossible to identify whether a decedent was operating a motor vehicle or was intoxicated, let alone both, at the time of

death without a manual review of each file, and that defendant has no computer records, logs or summaries of any kind which could assist in such a determination. There has been no showing or assertion that these representations are false.

In the event defendant was unable to segregate out files without pertinent claims, the court directed defendant to make available persons with the necessary knowledge and skill to work with plaintiff promptly to review the pool of files and identify any pertaining to a death benefits claim where the deceased was determined to be driving while intoxicated at the time of death. By letter of October 27, 2000, defendant offered to proceed with such a venture at each location where claims files are maintained.

Plaintiff failed to avail herself of defendant's offer. Rather, plaintiff asked that defendant unilaterally identify any pertinent claims files for the two years preceding Mr. DePhillipo's death and then make them available for review at its offices. Plaintiff then observed that "[i]f Hartford has the ability to identify those files when standing next to a representative of the plaintiff, they have the ability to identify those files without a representative of the plaintiff standing by." It would be no more cumbersome for defendant's representatives to identify any pertinent files in plaintiff's absence than in her presence. Plaintiff's observation is correct. It also misses a key point.

It is plaintiff who questioned defendant's averment of consistent interpretation. The court contemplated that plaintiff or her representative be present to observe or participate in the identification process so that she could be assured it was being done conscientiously. Defendant should be pleased unilaterally to undertake this identification process if plaintiff now agrees to accept the result.

Enough is enough. The time to end discovery and resolve the long pending motion for summary judgment is now.

Each party is expected to do all that is practicable to achieve an efficient resolution of this litigation. Defendant offered to join with plaintiff in a review of all files which may contain the information she hopes to discover and to identify such files in the only manner feasible.

Defendant could have been more accommodating at times. Plaintiff's failure to act positively and promptly in pursuing available discovery opportunities has contributed to the undue delay in the resolution of this case. It is no answer for plaintiff to complain that the effort and cost of doing so is not commensurate with the value of her claim. Even a wealthy defendant has a right to defend against a claim, however modest, that it disputes. A plaintiff who determines that the effort or cost of sustaining his cause of action may be disproportionate to its value may not thereby claim some advantage. It is not responsible for a defendant which does have substantial

resources, however, to evade or prolong the identification of potentially critical evidence by proclaiming that it stores information in a manner which complicates its ability to do so.

Plaintiff's motion will be denied without prejudice to renew if defendant does not file by November 29, 2000 an affidavit from a knowledgeable officer or agent authorized to bind defendant verifying counsel's representations regarding the impossibility of identifying the requested claims information without an individual review of each death benefits claim file and of the absence of any records or computerized data which could assist in such identification, or if defendant otherwise fails to comply with this order.

Plaintiff may participate with defendant in the examination of files necessary to the identification and production of any pertinent information or entrust this process to defendant. In either event, defendant will be required to utilize whatever personnel may be necessary for however many shifts may be necessary, including evenings and weekends, to complete this process forthwith.\* Plaintiff, of course, may have access to any pertinent files which are identified which

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\*As noted in the court's memorandum of October 6, 2000, in many cases little more than a quick scan of final claims decision documents should be necessary to determine whether a beneficiary died while operating a motor vehicle and then if there was a finding of intoxication. If, as defendant suggested, a review would encompass as many as 3,000 cases for each of the two years, it can be concluded in sixteen and a half twelve hours days with a team (or teams) of five people scanning the key file documents for an average of ten minutes.

defendant will be required to provide at its headquarters. Plaintiff will be given a final opportunity to depose defendant's corporate designee. Plaintiff will have an opportunity promptly to supplement her response to the summary judgment motion with any pertinent evidence which may be uncovered. The court will then immediately rule on defendant's long pending motion.

**ACCORDINGLY**, this                    day of November, 2000, **IT IS**  
**HEREBY ORDERED** that plaintiff's Motion for an Order Pursuant to Fed. R. Civ. P. 37(b)(2)(A) (Doc. #28) is **DENIED** without prejudice to renew if defendant does not by November 29, 2000 file an affidavit from a knowledgeable officer or agent authorized to bind defendant verifying the representations of counsel on October 27, 2000 regarding the identification of claims files which may contain the information requested by plaintiff, or if defendant otherwise fails to comply with this order; defendant shall immediately undertake the identification of any files involving death benefits claims where covered persons died while operating a motor vehicle when intoxicated for the two years preceding the death of Bruce DePhillipo and shall commit to that task whatever personnel may be necessary for however many shifts may be necessary, including evenings and weekends, to ensure that the process is completed by December 11, 2000; plaintiff or persons designated by her may participate in this process if she wishes, but the process shall not be deferred or interrupted because for any reason she or her designees are

not present; defendant shall advise plaintiff by telefax by December 12, 2000 whether any pertinent files exist and, if they do, shall make such files available at its headquarters for inspection and copying no later than December 14, 2000; plaintiff shall have until December 15, 2000 to conduct any desired deposition of defendant's corporate designee; plaintiff shall have until December 19, 2000 to file a supplement to her response to defendant's summary judgment motion with any pertinent information which may be discovered; the court will decide the motion by December 21, 2000 and, if appropriate, set a trial date; and, the discovery deadline is extended to December 15, 2000 for the sole purpose of compliance with this order.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**