

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

WILLIAM A. MA " ,  
Plaintiff

CIVIL ACTION

v.

:

UNUM LIFE INSURANCE COMPANY  
OF AMERICA, at al.  
Defendants

NO. 02-1346

MEMORANDUM

McLaughlin, J.

March 19 , 2003

Before the Court are three issues that have been raised by the plaintiff's motion in limine, the plaintiff's motion to compel, or the defendants' motion for a protective order. These issues are: whether the plaintiff should be allowed to introduce at trial the videotaped testimony of Dr. Patrick Fergal McSharry, a former employee at the Chattanooga office of one of the defendants; whether the defendants shall be required to produce statistical information about the defendants' handling of other claims; and whether the defendants shall be compelled to produce information about the impact of reserves on the defendants' profitability, the defendants' general reserve setting and release procedures, and the specific reserve amount set for the

plaintiff's claim<sup>1</sup>.

Because the plaintiff has not shown that the testimony of Dr. McSharry is relevant and because its admission would violate other rules of evidence, the Court denies the motion in limine. The Court also denies the plaintiff's motion to compel statistical information. The Court grants the portion of the motion for a protective order that relates to the reserve information'.

I. Motion in Limine- Dr. McSharry's Testimony

The plaintiff's complaint presents a claim of bad faith under 42 Pa. C.S.A. § 1871. To succeed on this claim, the plaintiff must prove that the defendant insurer lacked a reasonable basis for denying benefits to the plaintiff, and that the insurer knew of, or recklessly disregarded, its lack of a reasonable basis. Tereletsky v. Prudential Property and Casualty Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994).

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<sup>1</sup> The motion in limine seeks the admission of Dr. McSharry's testimony. The plaintiff's motion to compel requests the statistical information. The defendants raised the reserve information issues in their motion for a protective order in response to the plaintiff's requests for such information.

<sup>2</sup>The motion for a protective order also raised an issue regarding timeliness of the notice of the deposition at issue. The defendants have agreed to set aside this issue. In the order accompanying this memorandum, the Court denies this part of the motion for a protective order as moot.

The plaintiff has also pled and is pursuing a claim for breach of contract. In order to prove this claim, the plaintiff must show that 1) there was a contract between the defendant and the plaintiff; 2) the defendant breached a duty imposed by that specific contract; and 3) damages resulted. J.F. Walker Co. inc. v. Excalibur Oil Grp., 2002 Pa. Super. 39 (2002).

Both of these claims focus on the defendants' conduct towards the plaintiff specifically, not the defendants' general conduct. The Court finds that the testimony of Dr. McSharry is not relevant to either of these claims because the testimony relates only to the general business practices of the defendants, not to the handling of the plaintiff's claim.

I agree with the reasoning of Judge Cahn in Hvde Athletic Indus. Inc. v. Continental Casualty Co., 969 F. Supp. 289, 307 (E.D. Pa. 1997). The bad faith statute addresses only whether the insurer acted recklessly or with ill will towards the plaintiff in a particular case, not whether the defendants' business practices were generally reasonable. This reasoning also applies to the plaintiff's breach of contract claim, which relates only to the terms of any contract between the parties and not the defendants' general business practices. Unless the plaintiff can show a link between his specific case and the allegedly unreasonable general business practices, such practices

are irrelevant to the plaintiff's claim. See Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 583 (E.D. Pa. 1999) (granting summary judgment in bad faith case despite evidence of defendant's use of flawed computer program because no evidence of a link between the computer program and the handling of plaintiff's claim).

Dr. McSharry's testimony is relevant only to the general reasonableness of the defendants' procedures, not to the handling of the plaintiff's claim or to the purported breach of any contract between the parties.

It is undisputed that Dr. McSharry was not involved in and had no knowledge of the handling of the plaintiff's claim. The plaintiff argues that Dr. McSharry's testimony is still relevant, however, because it provides evidence **of** a company-wide policy in place in all of the defendants' offices, which was then applied to the plaintiff's claim. There is no evidence that there was a company-wide policy or that such a policy was applied to the plaintiff's case.

Dr. McSharry testified at length about the claim review practices employed by the Chattanooga office. It is clear from Dr. McSharry's testimony that his knowledge relates only to his

personal experience in that office'. There is no evidence that the unwritten patterns and practices followed by those in the Chattanooga office were the general business practices of the company as a whole. Dr. McSharry does not state or allege that the practices were based on company-wide policy or were engaged in pursuant to orders from anyone outside the Chattanooga office. The plaintiff has presented no other evidence that would indicate that those reviewing the plaintiff's claim engaged in the same practices about which Dr. McSharry testified. Without any indication of a link to the instant case, Dr. McSharry's testimony is irrelevant and inadmissible.

In addition to being irrelevant, Dr. McSharry's testimony would inject several additional issues into the trial. These issues include evidence about Dr. McSharry's employment and termination, his own lawsuit against the defendants, and about the patterns and practices of the Chattanooga office and those with whom Dr. McSharry worked. The undue delay, waste of time, and potential confusion of the issues that would result far outweigh any probative value the testimony has, mandating its exclusion under Federal Rule of Evidence 403.

Additionally, it is questionable whether the plaintiff

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<sup>3</sup>The plaintiff's claim was not handled through that office or by individuals associated with that office.

has met the requirements for the admission of hearsay deposition testimony under Federal Rule of Evidence 804(b).

Under this Rule, former testimony may be admitted if the declarant is unavailable. The plaintiff argues that Dr. McSharry is unavailable because Magistrate Judge William B. Mitchell Carter of the District Court for the Eastern District of Tennessee has issued an order stating that no further depositions of Dr. McSharry would be taken without the express prior permission of that court. In order to get this permission, the party wishing to depose Dr. McSharry must petition the court and show why the additional testimony is necessary.

The plaintiff has not petitioned Magistrate Judge Carter for permission to depose Dr. McSharry. Because the plaintiff has not explored this avenue of obtaining Dr. McSharry's testimony, it would be premature to find that the testimony cannot be procured by process or other reasonable means.

It is also questionable whether the plaintiff has demonstrated that the defendants had the motive and opportunity to develop the testimony of Dr. McSharry as required by Rule 804(b) (1). The deposition testimony at issue was taken as part of six separate lawsuits, unrelated to this case, filed against the defendants and other affiliates. The defendants allege that

cross-examination was cut off before it was complete, at the end of one and one-half days. It is questionable whether one and one-half days is sufficient to fully develop the testimony of a witness who has been subpoenaed for deposition in at least twenty claims against the defendants.

In addition to showing that the defendants had the opportunity to develop Dr. McSharry's testimony, the plaintiff also has to show that "the earlier treatment of the witness is the rough equivalent of what the party against whom the statement is offered would do at trial if the witness were available to be examined by the party." Kirk v. Raymark Indus., 61 F.3d 147, 166 (3d Cir. 1995), cert. denied 516 U.S. 1145 (1996). It is not clear that the defendants had the same motive to cross-examine Dr. McSharry during the deposition as they would have in this case, which involves a claimant, claim, and claims handling office that are different from those in the cases at issue in the deposition<sup>4</sup>.

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<sup>4</sup>The plaintiff also alleges that the testimony is admissible under Federal Rule of Civil Procedure 32. Rule 32, however, allows the admission in one case of a deposition taken in a different case only where the parties and the subject matter of the two cases are the same. Neither of these requirements are met in this case - the parties are different, as is the subject matter. Some courts in other circuits have allowed deposition testimony to be introduced although these two requirements were not strictly met. See Wright, et al., Federal Practice & Procedure, § 2150, n. 9 (collecting cases). Even in those cases,

11. Motion to Compel - Statistical Information

The plaintiff seeks discovery of statistical information about numerous claims that are factually distinct from the claim at issue in this case. Even if the plaintiff could use this statistical information to show that the defendants engaged in inappropriate behavior towards other claimants, this would be evidence only of a general business practice. The statistical evidence, like Dr. McSharry's testimony, would have no bearing on the plaintiff's specific claim. This information is therefore irrelevant and not discoverable.

111. Motion to Ouash - Reserve Information

The plaintiff seeks to discover information about: (1) the initial claim reserve set for the plaintiff's claim and any adjustments made to that reserve; and (2) information about the companies' general reserve setting policies, including information about reserve setting and release procedures and the impact of reserves on the companies' financial status. The

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however, the courts required that the proponent of the testimony show that the other had the same motive to cross-examine the witness in the deposition as they would have in the trial. Id.

defendants have moved for a protective order to prevent the plaintiff from discovering this information.

The plaintiff argues that the amount of the individual reserve is relevant because it reflects the value that the defendants put on the claim. He argues that the general reserve setting and release policies and the impact of reserves on the companies' financial status are relevant to show that the companies have an incentive to deny claims with a high reserve to improve its financial status. The defendants argue that the reserve information sought is irrelevant and protected by the work product doctrine.

A. Specific Reserve Set for the Plaintiff's Claim

The defendants have stated, and the plaintiff does not dispute, that the reserve for the plaintiff's claim was initially set in accordance with the Pennsylvania Insurance Commissioner's regulations. The amount of the initial reserve set is therefore irrelevant to the plaintiff's claim. If the reserve was set according to the regulations, the defendants had no discretion in setting the amount of the reserve, and the reserve amount is not a reflection of the defendants' judgment about the value of the claim. The amount of the reserve required by the regulations is not otherwise relevant to the plaintiff's bad faith or contract

claims. The amount of the initial reserve is, therefore, not discoverable.

After the initial reserve was set, the reserve amount was adjusted as the case progressed. The plaintiff seeks discovery of these modifications to the reserve. This information is not discoverable because it is protected work product.

Materials prepared in anticipation of litigation that reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation are not discoverable. Fed. R. of Civ. P. 26(b) (3); see also Hickman v. Taylor, 329 U.S. 495 (1947).

The defendants have stated, and the plaintiff has not disputed, that any adjustments made to the reserve after the initial reserve was set were made upon input by the defendants' legal department. The reserve adjustments reflect the thoughts and conclusions of the defendants' legal department or other employees about the value of the claim in light of the potential or pending litigation, including consideration of such factors as the likelihood of success in litigation and the cost of defending the claim. Any adjustments to the initial reserve reflect the mental impressions, thoughts, and conclusions of the defendants' legal department and other employees. Such information is

legal department and other employees. Such information is protected opinion work product and is not discoverable. See Simon et al. v. G.D. Searle & Co., 816 F.2d 397, 401-02 (8th Cir. 1987) (reserve information is protected by the work product doctrine); Rhone-Poulenc Rorer, Inc. v. The Home Indemnity Co. et al., 139 F.R.D. 609, 614-15 (E.D. Pa. 1991) (same); Leksi, Inc. v. Federal Ins. Co. et al., 129 F.R.D. 99, 106 ( D. N.J. 1989) (same).

B. General Reserve Information

The information about the defendants' general reserve setting procedures and financial information is also not discoverable. This information would demonstrate the general business practices of the defendants and would only be relevant to the plaintiff's claim if he could demonstrate a link between the reserve policies and the plaintiff's claim. Because the information about the specific reserve set in the plaintiff's claim is not discoverable, there is no way that the plaintiff can demonstrate this link. Without the specific reserve information, the general reserve information is irrelevant and not discoverable.

An appropriate order follows.

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

WILLIAM A. MANN,  
Plaintiff

CIVIL ACTION

v.

UNUM LIFE INSURANCE COMPANY  
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Defendants

NO. 02-1346

ORDER

AND NOW, this 19<sup>th</sup> day of March, 2003, upon consideration of the plaintiff's motion in limine (Docket # 19), the plaintiff's renewed motion to compel (Docket # 26), and the defendants' motion for a protective order (Docket # 31), and following oral argument on January 23, 2003, IT IS HEREBY ORDERED that, for the reasons explained in a memorandum *of* today's date, the motion in limine is DENIED, the motion to compel is DENIED, the portion of the motion for a protective order that relates to the plaintiff's requests for reserve information is GRANTED, and the portion of the motion for a protective order that relates to the timeliness of the corporate designee notice is DENIED AS MOOT.

BY THE COURT:

  
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MARY A. MCLAUGHLIN, J.