

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
Civil Action No. 05-1360-BLS2
(Judge Gants)

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY,)
HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD)
AND NEXT FRIEND, REBECCA RHODES,)

Plaintiffs,)

v.)

AIG DOMESTIC CLAIMS, INC. f/k/a AIG TECHNICAL)
SERVICES, INC., NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA, and ZURICH AMERICAN)
INSURANCE COMPANY)

Defendants.)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION
TO COMPEL ZURICH AMERICAN INSURANCE CO. TO
PRODUCE ALL WITHHELD CLAIMS MANUALS AND GUIDELINES**

This is an action to recover for the unfair settlement practices, including extreme delay, employed by the Defendants throughout the underlying personal injury action. The delay continues as Defendant, Zurich American Insurance Co. ("Zurich"), refuses to comply with this Court's January 23, 2006 Order to produce their withheld claims manuals and guidelines. Zurich's persistent stonewalling has forced Plaintiffs to move to compel these same documents for the third time. This Motion is an emergency because Plaintiffs are deposing a key defense witness on March 10, 2006. Therefore, Plaintiffs move to compel the production of the claims manuals and guidelines, at least 48 hours before the scheduled deposition, to allow Plaintiffs sufficient time to review them.

FACTUAL BACKGROUND

Marcia Rhodes was paralyzed from the waist down on January 9, 2002 when she was rear-ended by a 78,000-pound tractor-tanker unit driven by Carlo Zalewski. Zalewski and his employers were insured for \$2,000,000 under Zurich's primary policy and under a \$50,000,000 umbrella policy from National Union. AIGDC facilitated the claims handling for National Union, and Crawford & Company administered the claim for Zurich. On September 15, 2004, the jury awarded \$9,412,000 to the Plaintiffs (plus \$2,500,000 prejudgment interest). In April 2005, Plaintiffs filed the current action for unfair claims settlement practices.

THE CURRENT DISPUTE

In the present action, Plaintiffs served Zurich with their first Requests for Production of Documents and Interrogatories with the Complaint on April 8, 2005, specifically requesting the production of "all claims manuals related to personal injury and/or motor vehicle accident claims."¹ Zurich asked for several extensions to respond, yet repeatedly failed to do so until Plaintiffs' served Zurich with a motion to compel three months later.

When Zurich finally responded in late July 2005, it asserted a blanket objection stating that the request was "overly broad, unduly burdensome, and outside the scope of discovery," but at the same time it produced one document applicable to its third-party administrator, Crawford & Company. Plaintiffs thereafter requested that Zurich either produce any written policies or claims manuals applicable to Zurich's handling of this type of claim, or confirm in writing that none existed. Zurich contended that because its Major Case Unit always uses third party administrators, Zurich's own guidelines were irrelevant, and would not be produced. Thus, on November 23, 2005, Plaintiffs were again forced to move to compel the production of Zurich's

¹ Pursuant to Superior Court Rule 30A, the full text of the relevant requests and responses are included in the Appendix attached hereto as Exhibit A.

claim manuals. Additionally, on December 6, 2005, Plaintiffs served Zurich with a Second Request for Production of Documents, specifically detailing the types of claims manuals and guidelines requested. Zurich responded that there are “no responsive documents... that applied to the business activities of its TPA Claims Oversight Unit,” and refused to produce any of the requested documents. See Appendix at Exhibit A.² On December 21, 2005, Zurich produced another document applicable to its Third Party Administrator, but still refused to produce any of its own manuals or guidelines.

On January 23, 2006, this Court ordered the Defendants to produce, among other things, their “withheld claims manuals and claims handling guidelines,” including Zurich’s “Liability Best Practices,” which had been identified in Zurich’s Opposition to the Motion to Compel. Order, p. 24, 25. Zurich subsequently produced this document. Plaintiffs thereafter requested that Zurich supplement its Responses to Plaintiffs’ Requests for Production in light of the January 23rd Order to produce claims manuals and other claim handling guidelines, whether or not they applied to a particular unit. See Letter from Daniel Brown to Danielle Long, attached as Exhibit B.

Zurich has only produced the single manual identified by name in the Order and refuses to produce any additional claims manuals or guidelines. Zurich also refuses to confirm that no additional manuals exists because they cannot. In fact, “Zurich’s Litigation Management Guidelines for Defense Counsel,” is a manual specifically referenced by name in its “Liability Best Practices,” which provides in relevant part: “If the suit is referred to counsel other than Staff Legal or ZAAP counsel, the case manager must secure and confirm in writing counsel’s

² Moreover, Zurich’s Answers to Interrogatories state that the Major Case Unit was involved in the Rhodes claim. Plaintiffs have requested three times, to no avail, for Defendants to simply clarify which Zurich unit(s) was/were involved in handling this claim. See Letter from Daniel J. Brown to Gregory P. Varga, attached as Exhibit C. Zurich, however, refuses to answer that simple question.

agreement to comply with Zurich's Litigation Management Guidelines for Defense Counsel (Guidelines)."

Zurich claims that it needs more time to determine whether responsive documents exist and to analyze this Court's Order. Over ten months have passed since Plaintiffs first requested Zurich's claim manuals and guidelines, over two months have passed since service of more specific requests, and over a month has passed since this Court specifically ordered that such documents be produced; Zurich has had plenty of time. In order to prevent further delay, Plaintiffs request that Zurich be ordered to produce all withheld claims manuals and guidelines, including the Litigation Management Guidelines immediately, and no less than 48 hours before the deposition of Kathleen Fuell.

ARGUMENT

Zurich's roadblocks are hindering Plaintiffs' reasonable discovery efforts. Zurich is claiming both that the Order does not require the production of any claims manuals other than the one document referenced by name in the Order and that it needs more time to discover whether responsive documents exist. Both of these claims, however, are patently disingenuous.

First, the Order states that all withheld claim manuals and claims handling guidelines shall be produced. Order, p. 25 (emphasis added). Despite the Order, Zurich apparently believes that this Court meant only to require production of the one document identified by exact title. The Order only identified one manual by name because that was the only document name revealed by Zurich. The Order was not limited to only that document; this Court ordered *all* withheld claims manuals to be produced, not simply the "Liability Best Practices" manual.

Second, Zurich has had the Document Requests for almost a year, clearly more than enough time to review their own written policies and procedures. Yet, even when Plaintiffs are

able to identify a document by name, such as “Zurich’s Litigation Management Guidelines for Defense Counsel,” Zurich still refuses to produce it, claiming they need more time. This is nothing more than a continuation of Defendant’s pattern of delay and obstruction. Unless Zurich is required to produce documents before the deposition of Kathy Fuell, scheduled for March 10, Plaintiffs will be prejudiced, and Zurich will have succeeded in controlling Plaintiffs’ discovery and in causing further delays.

Zurich’s pattern of dilatory and evasive conduct in this case has already caused many hours of wasted time and money and forced Plaintiffs to repeatedly engage in fruitless efforts to obtain reasonable discovery. Such tactics frustrate the proper purpose of discovery, and should not be permitted to continue. “A trial is still a search for truth. It should not be a game of hide and seek.” Bobo v. Mitsubishi Motors Corp., 1999 Mass. Super. Lexis 200, *10 (March 8, 1999). Accordingly, the Massachusetts Rules of Civil Procedure provide for a “system of sanctions” as a means to compel discovery. Wainwright Bank and Trust Co. v. Rawann, 1998 Mass. Super. Lexis 370, *5 (February 2, 1998). Persistent failure to comply with a discovery order has resulted in such severe sanctions as default judgment. See e.g., Roxse Homes Ltd. Partnership v. Roxse Homes, Inc., 399 Mass. 401, 406 (1987) (holding that where defendant’s noncompliance was a clear violation of court orders and it had more than one opportunity to comply, the entry of default judgment was proper); Maywood Builders Supply Co., Inc. v. Lester, 22 Mass. App. Ct. 944, (1986) (following several efforts to flush out documentary material fundamental to the proof of the case, dismissal was proper as based on a persistent and substantive violation of the discovery rule). Accordingly, an order compelling Zurich to immediately produce all claim manuals and guidelines as previously ordered is clearly proper.

Furthermore, given the pattern of delay and obstruction that has forced Plaintiffs to serve this third motion to compel on Zurich for the same documents, Defendant should also be required to pay the costs of this motion pursuant to Mass. R. Civ. P. 37(a)(4). Requiring Zurich to pay the costs of this motion will serve to deter them from continuing its pattern of delay and obstruction. See Corsetti v. Stone Co., 396 Mass. 1, 26 (1985) (“The sanctions provided by rule 37 are designed not only to compel compliance with discovery requests; they also act as a deterrent to unwarranted evasions of discovery.”).

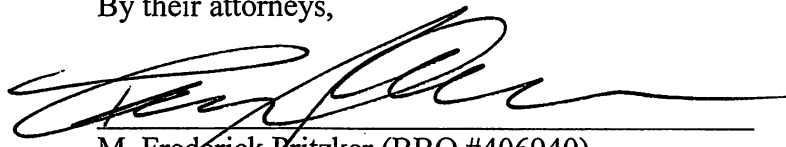
CONCLUSION

For the reasons stated above, Plaintiffs request that Zurich be required to (1) produce all withheld claims manuals and guidelines before 9 A.M. on Wednesday, March 8, 2006 to allow sufficient time for Plaintiffs to review the documents before the deposition of Kathy Fuell; and (2) pay the costs of bringing this Motion and any other sanction this Court deems appropriate.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES,
INDIVIDUALLY, HAROLD RHODES,
ON BEHALF OF HIS MINOR CHILD
AND NEXT FRIEND, REBECCA RHODES,

By their attorneys,

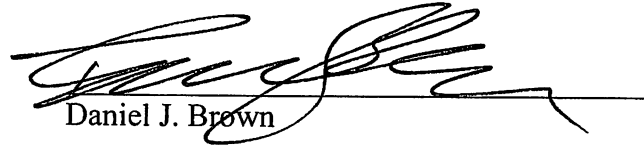


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DATED: March 1, 2006

Rule 9C Certificate

I hereby certify that I conferred with Gregory P. Varga, counsel for Zurich, the afternoon of February 23, 2006, in a good faith attempt to narrow the areas of disagreement, but to no avail.


Daniel J. Brown

CERTIFICATE OF SERVICE

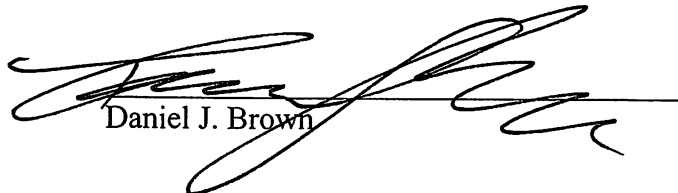
I hereby certify that on this day, a true and accurate copy of the above document was served via hand delivery on the attorney of record for each party at:

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DATED: March 1, 2006


Daniel J. Brown

Appendix

Plaintiffs First Request for Production of Documents Directed to Zurich American Insurance Company (April 8, 2005):

3. Any and all documents relating to or constituting policies and procedures for adjusting or otherwise processing personal injury and/or motor vehicle accident claims, including but not limited to, any and all claims manuals related to personal injury and/or motor vehicle accident claims.

Response

Zurich objects to Request No. 3 on the grounds that it is overly broad, unduly burdensome and seeks documents outside the scope of discovery as prescribed by M.R.C.P. 26. Without waiving these objects, please see Response No. 3. Zurich's investigation is ongoing and it reserves the right to supplement this response.

Plaintiffs' Second Request for Production of Documents Directed to Zurich American Insurance Company (December 6, 2005):

21. Any and all policies and procedures concerning assignment of claims to third-party administrators, including, but not limited to, such policies applicable to the Major Case Unit.

Response

Counsel for Zurich objects to Request No. 21 on the ground that it is vague, overly broad, unduly burdensome, seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Notwithstanding and without waiving its objection, Zurich responds as follows: There are no responsive documents within Zurich's possession, custody or control.

22. Any and all documents concerning Zurich's reserve authority process.

Response

Counsel for Zurich objects to Request No. 22 on the ground that it is vague, overly broad, unduly burdensome, seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks documents that are otherwise beyond the scope of permissible discovery under Mass. R. Civ. P. 26.

Notwithstanding and without waiving its objection, Zurich responds as follows: Zurich has no responsive documents that were created or maintained during the years 2002,

2003, or 2004 that applied to the business activities of its TPA Liability Claims Oversight unit, the only unit involved with the Plaintiffs' underlying claims litigation.

23. Any and all documents concerning Zurich's evaluation authority process.

Response

Counsel for Zurich objects to Request No. 23 on the ground that the undefined phrase "evaluation authority process" is vague and unintelligible. Zurich further objects on the ground that it is overly broad, unduly burdensome, seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks documents that are otherwise beyond the scope of permissible discovery under Mass. R. Civ. P. 26.

Notwithstanding and without waiving its objection, Zurich responds as follows: Zurich has no responsive documents that were created or maintained during the years 2002, 2003, or 2004 that applied to the business activities of its TPA Liability Claims Oversight unit.

24. Any and all documents concerning Zurich's litigation management policies and procedures.

Response

Counsel for Zurich objects to Request No. 24 on the ground that it is vague, overly broad, unduly burdensome, seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks documents that are otherwise beyond the scope of permissible discovery under Mass. R. Civ. P. 26.

Notwithstanding and without waiving its objection, Zurich responds as follows: Zurich has no responsive documents that were created or maintained during the years 2002, 2003, or 2004 that applied to the business activities of its TPA Liability Claims Oversight unit.

25. Any and all documents concerning policies and procedures for the Major case unit.

Response

Counsel for Zurich objects to Request No. 25 on the ground that it is vague, overly broad, unduly burdensome, seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and seeks documents that are otherwise beyond the scope of permissible discovery under Mass. R. Civ. P. 26.

Notwithstanding and without waiving its objection, Zurich responds as follows: Zurich has no responsive documents that were created or maintained during the years 2002,

2003, or 2004 that applied to the business activities of its TPA Liability Claims Oversight unit.