

3/10/08

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No.: 05-1360-BLS

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.)

**OPPOSITION OF DEFENDANT ZURICH AMERICAN INSURANCE
COMPANY TO PLAINTIFFS' REQUEST FOR SANCTIONS IN CONNECTION
WITH THEIR EMERGENCY MOTION TO COMPEL ZURICH
TO PRODUCE ALL WITHHELD CLAIMS MANUALS AND GUIDELINES**

Defendant Zurich American Insurance Company ("Zurich") hereby submits this memorandum in opposition to Plaintiffs' request for sanctions against Zurich in connection with Plaintiffs' Emergency Motion to Compel Zurich to Produce all Withheld Claims Manuals and Guidelines ("Motion to Compel").

I. INTRODUCTION

Owing to the nature of the claims asserted in this action and the sensitive nature of the documents Plaintiffs have requested, several good faith discovery disputes have arisen. Yet every single time the parties have reached an impasse as to the discoverability of certain documents or have been otherwise unable to resolve their differences regarding the timing of depositions or document productions, Plaintiffs have asked the Court to impose sanctions against

Defendants. Although it follows a familiar pattern, the instant request for sanctions presents a somewhat new twist. This time around, Plaintiffs have resorted to misrepresenting and concealing material facts in an effort to persuade the Court that sanctions are warranted. This tactic cannot be countenanced. The truth is that Zurich has not improperly withheld any documents. Plaintiffs' request for sanctions should be DENIED.

II. ARGUMENT

On or about March 1, 2006, Plaintiffs filed the instant Motion to Compel with the Court. As indicated by recent correspondence to the Court by both parties, Zurich has agreed to produce additional documents which are responsive to Plaintiffs' Second Request for Production. Plaintiffs withdrew their Motion to Compel, but not their accompanying request for sanctions.

Plaintiffs would have this Court believe that the documents that are the subject of their recently withdrawn Motion to Compel were first requested in April 2005 and were ordered to be disclosed through the Court's Order dated January 23, 2006. Both assertions are false.

Plaintiffs served Zurich with their First Request for Production of Documents in April 2005 and requested Zurich to produce "[a]ny 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." (See Motion to Compel, Exhibit A.) After a diligent search of its records, Zurich identified a single document responsive to Request No. 3, entitled "Liability Best Practices." As the Court is aware, Zurich withheld that document in good faith based on its belief that it had no bearing whatsoever on the subject matter of this lawsuit. The Court ultimately disagreed with Zurich's position and ordered Zurich to produce all withheld claim manuals, including Liability Best Practices. Zurich promptly produced Liability

Best Practices on February 8, 2006. Lacking any good faith basis to do so, Plaintiffs have

asserted that Zurich withheld other "claim manuals" responsive to Request No. 3. That too is plainly false.

The documents that were the subject of Plaintiffs' recently withdrawn Motion to Compel were first requested on December 6, 2005 through Plaintiffs' Second Request for Production of Documents to Zurich. The requests at issue were:

Request No. 22: Any and all documents concerning Zurich's reserve authority process.

Request No. 23: Any and all documents concerning Zurich's evaluation authority process.

Request No. 24: Any and all documents concerning Zurich's litigation management policies and procedures.

Request No. 25: Any and all documents concerning policies and procedures for the Major Case Unit.

Request No. 24, which seeks litigation policies and procedures, is obviously different from Plaintiffs' earlier request seeking "documents relating to or constituting policies and procedures for adjusting or otherwise processing personal injury and/or motor vehicle accident claims" that Plaintiffs requested in April 2005. Zurich does not have any documents responsive to Request Nos. 22, 23, or 25, as it has continually asserted.

Zurich responded to Request Nos. 22 through 25 prior to issuance of the Court's January 23rd Order and, consistent with its position regarding the discoverability of "Liability Best Practices," informed Plaintiffs that Zurich had "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." (See Motion to Compel, Exhibit A.)

In light of the Court's January 23rd Order addressing the discoverability of Zurich's "Liability Best Practices," Zurich undertook further research into the existence of documents

responsive to Request Nos. 22 through 25 other than those that might have been applicable only to the Liability TPA Claims Oversight unit. Contrary to Plaintiffs' representation, Zurich did not refuse to produce additional documents in response to these requests. Indeed, the material facts Plaintiffs deliberately omitted from their Motion to Compel explain why Zurich was unable to identify and produce the requested documents within the precise time frame requested by Plaintiffs. As Zurich's counsel explained to Plaintiffs' counsel on several occasions both orally and in writing, the process of identifying and reviewing documents potentially responsive to Request Nos. 22-25 was substantially hindered by the fact that the person at Zurich with whom its counsel was collaborating on this search experienced a sudden death in his immediate family (his father) and was out of the office for a number of days in the latter part of February. (See letter from G. Varga to D. Brown dated February 21, 2006, attached hereto as Exhibit 1.) Zurich's counsel explained that a response to Plaintiffs' inquiry would come shortly and as soon as that individual returned to work after funeral services. (See Exhibit 1.) Zurich's counsel had hoped that Plaintiffs would understand and accommodate Zurich's need for a few additional days to respond, given the circumstances. Instead, Plaintiffs moved for sanctions. Upon that individual's return to the office during the week of February 27, 2006, documents responsive to Request No. 24 were identified, and on March 2, 2006, Zurich agreed to produce them to Plaintiffs prior to the first scheduled deposition. (See G. Varga letter to D. Brown dated March 2, 2006, attached hereto as Exhibit 2.) Plaintiffs received the documents on March 8, 2006. (See Zurich's Supplemental Responses to Plaintiffs' Second Request for Production of Documents, attached hereto as Exhibit 3.)

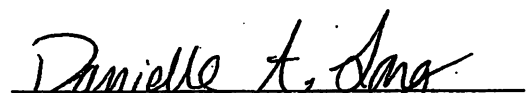
There can be no doubt that Plaintiffs concealed the foregoing material facts from the Court when moving for sanctions because they knew full well that any delay in Zurich's

production of the requested documents was the product of an unfortunate and unforeseeable occurrence that was beyond Zurich's control.

Contrary to Plaintiffs' misleading representations, Zurich did not fail to comply with the Court's January 23rd Order; it did not withhold additional "claim manuals" responsive to Request No. 3; and it did not refuse to produce additional documents in response to Request Nos. 22 through 25. As there is no basis for the imposition of Rule 37 sanctions, Plaintiffs' Motion to Compel should be denied.

WHEREFORE, Defendant Zurich American Insurance Company respectfully requests this Court to DENY Plaintiffs' request for sanctions in connection with their Emergency Motion to Compel Zurich to Produce all Withheld Claims Manuals and Guidelines.

**Defendant,
Zurich American Insurance Company,
By its Attorneys,**


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3/10/06

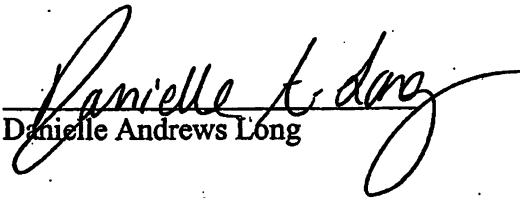
CERTIFICATE OF SERVICE

I, Danielle Andrews Long, certify that on this 10th day of March, 2006, I caused a copy of the foregoing to be served by hand delivery upon:

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