

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, DE 19801-3733
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September 18, 2012

(VIA E-FILED)

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RE: *Viking Pump, Inc., et al. v. Century Indemnity Company, et al.*
C.A. No. 10C-06-141 FSS CCLD

**Upon Defendants' Motion to Preclude Plaintiffs from Offering at Trial
Summary Tables or Charts Produced by Liberty - DENIED.**

**Upon Defendants' Motion *in Limine* to Exclude Documents Produced by
Warren After Close of Discovery - DENIED, *in part*. GRANTED, *in part*.**

Dear Counsel:

This decides the remaining two motions *in limine*. First, Defendants move to preclude Plaintiffs from offering Liberty Mutual's "summary tables or charts," specifically, "loss runs." A loss run is a payment report, created after a specific query from Liberty Mutual's "loss data warehouse," the electronic storage for processed claim payments. Liberty Mutual was the primary carrier at the bottom of Plaintiffs' insurance towers. To reach Defendants' excess coverage policies, Warren and Viking must show the Liberty Mutual policy limits have been exhausted. According to Plaintiffs, these loss runs bear on "exhaustion."

Among other things, Defendants complain that Plaintiffs failed to produce the underlying claims from which those loss runs are generated. Actually, Defendants are trying to re-litigate the limited production the Court of Chancery

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granted on the underlying claims, as well as this court's similar holdings.

Defendants argue that Chancellor Strine's limited production ruling has little to do with this because he rendered that decision during "Phase II," without considering the "exhaustion" issue. Approximately a year and a half before Chancellor Strine's ruling, however, excess insurers' thoroughly presented the exhaustion issue and Defendants' desires for claim production.¹ By the time Chancellor Strine rendered that decision, he knew the parties' complaints. The court reemphasises that during the years this case was litigated in the Court of Chancery and "discovered to death," discovery was not limited to "Phase I," "Phase II," or at all². Despite that, Defendants keep challenging the law of this case. In the process, Defendants disrupt trial preparations, even after the court warned them about that.

Plaintiffs offer the "loss runs" as business records, for which a proper foundation can be laid. Moreover, Plaintiffs argue that loss run reports are Liberty Mutual's monitoring system for policy exhaustion, not for litigation purposes. Defendants have some underlying documentation, which they can use to undermine Plaintiffs' statistical assumptions. Again, the use of sampling has been ruled-on. Regardless, if Plaintiffs cannot meet the evidentiary rules for admissibility, that will be addressed at trial. Meanwhile, Defendants' Motion to Preclude Plaintiffs from Offering at Trial Summary Tables or Charts Produced by Liberty is ***DENIED***.

As for Defendants' motion to preclude untimely document production, Defendants claim Warren produced over 60,000 pages of discovery after the March

¹ *Viking Pump, Inc. v. Liberty Mutual Ins. Co.*, C.A. No.: 1465-VCS, Oct. 10, 2007 Status Conference Transcript, Strine, V.C., Transaction ID 16824158.

² *See Viking Pump, Inc. v. Liberty Mutual Ins. Co.*, C.A. No.: 1465-VCS, June 9, 2010 Status Conference Transcript, Strine, V.C., Transaction ID 31611328 (Emphasizing that moving the case to Superior Court was "the end stage" and requests for duplicative discovery should be met with sanctions. Chancellor Strine instructed: "I want [] certification to indicate the things I mentioned, . . . that folks are not trying to essentially reargue previous discovery motions that were handled. So, . . . I do not expect anybody is going to be particularly finding favor with the argument that 100 percent of the Liberty files over the years [should be produced]").

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30, 2012 discovery deadline. In addition to being unfairly prejudiced, Defendants argue that Warren possessed the documents before discovery closed and, despite several production requests, Plaintiff strategically produced them after the discovery cut-off.

Specifically, Defendants claim Warren failed to timely produce approximately 58,000 pages relating to this case's underlying asbestos claims, settlements, and defense costs, in addition to several public litigation documents. Not surprisingly, the parties disagree on which documents were actually requested. Defendants claim "pump studies and photographs" were requested, but Warren argues otherwise, and so on. After years of hearing it in the Court of Chancery and here, the parties's chronic sniping, bickering, and self-righteous protestations have become a dull drone.

Anyway, assuming without deciding that some recent production is part of what Defendants requested years ago, Defendants waited far too long to protest. By the same token, Plaintiffs cannot ignore the court's scheduling orders and produce their evidence at the last minute. So, Plaintiffs cannot use any documents they produced after the deadline, no cause for the delay having been shown. And, Defendants cannot complain that they got the documents late.

Therefore, the several thousand pages relating to asbestos settlement documents and defense invoices that were produced after discovery closed cannot be used by Plaintiffs at trial. Documents produced after the cut-off, which were not requested and were publicly accessible, are allowed.

Additionally, the Liberty Mutual policy form produced by Warren on August 17, 2012 is allowed. The parties mutually agreed to depose Peter Wilson after discovery closed. Wilson testified about a "supplementary defense endorsement" that he penned. After several requests from Plaintiffs, Defendants produced Wilson's endorsement on August 11. Six days later, Plaintiffs produced a rebuttal form from Liberty Mutual containing the same language Wilson claims to have drafted. The court sees no unfair prejudice in allowing the form's use at trial. No harm, no foul.

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For the foregoing reasons, Defendants' Motion *in Limine* to Exclude Documents Produced by Warren After Close of Discovery is ***DENIED, in part***, and ***GRANTED, in part***. Again, Defendant's Motion to Preclude Plaintiffs from Offering at Trial Summary Tables or Charts Produced by Liberty is ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
oc: Prothonotary (Civil)