

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MINE SAFETY APPLIANCES)
COMPANY,)
)
Plaintiff,) C.A. No. 10C-07-241 MMJ
)
v.)
)
AIU INSURANCE COMPANY, et al.,)
)
Defendants.)

Submitted: April 15, 2013
Decided: June 6, 2013

On Exceptions to the March 19, 2013 Memorandum Opinion
of the Special Discovery Master

DENIED

ORDER

On October 22, 2012, Mine Safety Appliances Company (“MSA”) filed a motion seeking to compel discovery. MSA requested discovery of information relating to coal-dust-related claims submitted to certain defendant insurers (“Insurers”) by American Optical Corporation and 3M Company. Additionally, MSA sought to compel production of information relating to the Insurers’ agreements and communications with their reinsurers about policies that the Insurers issued to MSA.

Following briefing, the Special Discovery Master held oral argument on February 7, 2013. By Memorandum Opinion issued March 19, 2013, the Master concluded:

Consistent with the foregoing, the MSA's Motion to Compel is granted in part and denied in part. Specifically:

1. MSA's request to compel production of other policyholder information is denied.
2. MSA's request to compel production of reinsurance agreements pursuant to Rule 26(b)(2) is granted only as to those Insurers against whom MSA is currently seeking monetary damages. MSA shall identify any such Insurers within five days of the date of this ruling.
3. MSA's request to compel the Insurers to produce all communications between them and their reinsurers relating to MSA's insurance policies, including MSA's bodily injury claims, is denied; provided, however, that insofar as an Insurer has raised and maintains an untimely notice defense, that Insurer must produce all non-privileged communications with any reinsurer relating to when the Insurer received notice from MSA or another source of a claim against MSA and when the Insurer gave notice to its reinsurer with respect to any notice of a claim under any policy at issue in this case.

To the extent the Motion to Compel is granted, the insurers shall supplement their discovery responses within two weeks of this order or by such other date as mutually agreed upon by the parties.

By letter dated March 21, 2013, the Master clarified the March 19th Opinion in certain respects.

On March 26, 2013, MSA filed Exceptions to the March 19, 2013 Memorandum Opinion Regarding Reinsurance and “Other Policyholder” Information.

On April 2, 2013, Defendants Travelers Casualty and Surety Company and the Travelers Indemnity Company (“Travelers”) also filed Exceptions Concerning Reinsurance and “Other Policyholder” Information. Defendants Employers Insurance Company of Wausau and Associated International Insurance Company joined Travelers’ Exceptions.

On April 2, 2013, Defendants American Home Assurance Company, Granite State Insurance Company, Insurance Company of the State of Pennsylvania, Lexington Insurance Company, National Union Insurance Company of Pittsburgh, PA, AIU Insurance Company and Chartis Property Casualty Company filed Limited Exceptions to the March 19, 2013 Memorandum Opinion.

Several defendants filed opposition to MSA’s exceptions. MSA filed opposition to Travelers’ Exceptions. Both MSA and Travelers filed replies.

The Exceptions and Limited Exceptions filed on April 2, 2013 are untimely. The Special Discovery Master’s clarifying letter is dated March 21, 2013. The parties had 5 business days within which to file exceptions, *i.e.*, until

March 28, 2013. No request was made to the Court to extend the time within which exceptions could be filed.

In its Exceptions, MSA argues that reinsurance information should encompass all fact-based affirmative defenses, and should not be limited to the late notice defenses. MSA argues that if the Insurers made statements to their reinsurers regarding underlying policies or MSA's handling of claims, the statements would be highly relevant to the affirmative defenses and should be produced. Further, MSA contends that it needs "other policyholder" information to rebut the Insurers' fact-based affirmative defenses concerning the reasonableness of MSA's indemnity and defense costs. Such information could be produced in summary form; would be limited to amounts paid by the same types of defendants in the same jurisdictions for the same types of claims; and confidentiality could be protected.

Defendants respond that the Master correctly concluded that only non-privileged communications with reinsurers regarding the late notice defense were sufficiently relevant to require production. It is premature to determine whether other affirmative defenses will be pursued. Additionally, all communications between the Chartis insurers and their reinsurers are protected as work product or subject to the attorney-client privilege. Defendants also claim that MSA's

Exceptions are improper because they raise issues not presented in the Motion to Compel.

Travelers argues that Superior Court Civil Rule 26(b)(2) does not apply to reinsurance contracts. Additionally, discovery of reinsurance communications will damage Travelers' relationships with its reinsurers. Travelers suggests that the March 19th findings be modified to require Insurers maintaining an untimely notice defense to produce only their first notice communications to any reinsurers.

In Limited Exceptions filed by other defendants, led by American Home Assurance Company ("American Home"), American Home contends that production of reinsurance agreements should not be required. American Home argues that because MSA is not a party to any reinsurance agreement, the reinsurer cannot be liable for any risk beyond the terms of the reinsurance agreement. Further, the terms and conditions of the reinsurance contracts differ from the terms and conditions of the policies the contracts reinsure. American Home asserts that any communications with the Chartis insurers are protected by the work product privilege.

* * * * *

The Court finds that the Special Discovery Master carefully considered all issues raised by the parties. The March 19th Memorandum Opinion was crafted to

balance the need for relevant discovery, the burden on the parties in identifying and producing discovery, and the applicable privileges. The Memorandum Opinion is consistent with applicable legal precedent and Delaware's Superior Court Civil Rules. The Court is not persuaded by any exceptions to the Memorandum Opinion. Upon *de novo* review, the Court finds the Memorandum Opinion to be well-reasoned.

THEREFORE, the Memorandum Opinion of the Special Discovery Master issued March 19, 2013, as well as the clarifying letter dated March 21, 2013, are hereby **APPROVED**. All exceptions are hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston