

**Medical Support Sys., Inc. v Liberty Mut.
Ins. Co.**

2007 NY Slip Op 31390(U)

May 18, 2007

Supreme Court, New York County

Docket Number: 0602819/2004

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN
Justice

PART 11

MEDICAL SUPPORT SYSTEMS, INC.,
ET AL

INDEX NO. 602819/04

MOTION DATE 3/8/07

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

- v -

LIBERTY MUTUAL INSUR. CO.

The following papers, numbered 1 to _____ were read on this motion to compul discovery

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with
the appended memorandum Decision + Order.

FILED

MAY 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 18, 2007

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X INDEX NO. 602819/04

MEDICAL SUPPORT SYSTEMS, INC.,
WESTCHESTER COACH, INC., MEDICAL
SUPPORT TRANSPORTATION, INC. and
WESTCHESTER AMBULETTE SERVICE, INC.,

Plaintiffs,

--against--

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant.

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

JOAN A. MADDEN, J.:

In this action arising out of dispute regarding the amount of premiums charged to plaintiffs for automobile liability insurance coverage provided pursuant to the New York Automobile Insurance Plan ("the Plan"), plaintiffs move for an order directing that defendant Liberty Mutual Insurance Company ("Liberty") to produce additional documents and supplemental interrogatory responses or, alternatively, striking Liberty's answer and counterclaims. Liberty opposes the motion, which is granted to the extent set forth below.

Background

Plaintiffs Medical Support Systems, Inc. ("Medical Support"), Westchester Coach, Inc. ("Westchester Coach"), Medical Support Transportation, Inc. ("Medical Transportation") and Westchester Ambulette Service, Inc. ("Westchester Ambulette") operate vans known as ambulettes, which transport mentally and physically disabled persons between their homes and regularly scheduled appointments with daycare facilities, schools and medical providers.

As an insurance company licensed to write automobile insurance in New York State, Liberty is

required, in accordance with article 53 of the New York Insurance Law, to participate in the Plan, which was created to assign private carriers to those individuals and companies that cannot obtain insurance in the voluntary market. In connection with this participation, Liberty entered into a form Servicing Carrier Agreement with the Plan, setting forth certain performance standards for Liberty, as a participating insurer, and providing for Liberty's compensation from the Plan. Pursuant to the Plan, Liberty issued policies to Medical Support and its additional insured Westchester Coach, Medical Transportation and Westchester Ambulette.¹

Liberty insured the plaintiffs for three annual policy terms beginning on March 1, 2001. The final policy term began on March 1, 2004 and ended on February 1, 2005, when Liberty cancelled the policies for plaintiffs' failure to pay premiums. Towards the end of second annual policy period, Liberty provided "renewal quotations" to plaintiffs regarding the cost of insurance for the third annual policy period. The renewal quotations were vastly higher than the premiums charged for the prior period, and the quoted rates provided to plaintiffs by Liberty. Although the papers are not clear, it appears that while Medical Support and its additional insured, Westchester Coach, were originally quoted a premium of \$153,421, Liberty subsequently sought a total of \$1,838,613 for the premium, surcharges, assessments and an installation fee. Westchester Ambulette was originally quoted an annual premium of \$153,431, and Liberty subsequently sought a total \$2,825,030 for the premiums, surcharges, assessments and an installation fee. Medical Transportation was originally quoted \$27,794, and Liberty subsequently sought a total of \$433,175 for the premium, surcharges, assessments and an installation fee.

The papers do not delineate how Liberty calculated the increased amounts allegedly owed to it

¹Policy numbers AS1-321-089143-014, AS1-321-089142-014, and AS1-321-089139-014 were issued respectively, to Medical Support, Westchester Ambulette, and Medical Transportation.

from plaintiffs, or what portion of these amounts are attributable to premiums as opposed to surcharges, assessments and fees, or whether the increased amounts were to be applied retroactively, prospectively, or both. However, the record indicates that the original quoted premiums did not take into account an experience factor, which is based on the accident experience of the insured vehicles during previous policy years, and that the increase in premiums also resulted from a change in territory codes and in the vehicle classification for the ambulettes. There is also evidence suggesting that Liberty's delay in providing the renewal quotations to plaintiffs prevented plaintiffs from cancelling the policies in time to avoid further and significant charges.

Plaintiffs commenced this action by order to show cause asserting a single cause of action seeking to enjoin Liberty from cancelling their insurance coverage as a result of their failure to pay the higher premiums and other charges. Plaintiffs obtained a temporary restraining order preventing Liberty from cancelling their policies pending a hearing and determination of their motion for a preliminary injunction. By order dated September 9, 2004, this court granted plaintiffs' motion, conditioned on plaintiffs posting a \$500,000 undertaking, and directed that plaintiffs provide proof of compliance by September 30, 2004 or the preliminary injunction would be vacated. Plaintiffs never filed an undertaking, and on February 1, 2005, Liberty cancelled the policies, rendering plaintiffs' complaint moot.

On or about May 19, 2006, Liberty filed a verified amended answer and asserted three counterclaims alleging causes of action for breach of contract under the three policies and seeking to recover unpaid premiums, surcharges, assessments, and fees purportedly due under each of the policies. As plaintiff's complaint is moot, only the counterclaims remain.

After this action was commenced, the Plan wrote letters to Liberty dated June 15, 2006 and July

26, 2006, indicating, inter alia, that the Plan's Governing Committee² determined that Liberty's actions in connection with charging plaintiffs the increased premiums and other charges constituted a failure to follow the Plan's performance standards and a breach of Liberty's material obligations under the Service Carrier Agreement. In its letter dated June 15, 2006, the Governing Committee directed Liberty to "honor the initial premium quotes it provided to [plaintiffs]³ prior to the application of the experience rating. Liberty shall be entitled to its fee based on those initial premium quotes, subject to the applicable rules and procedures of the [Plan]."

By letter dated December 22, 2006, the New York State Department of Insurance wrote the Liberty that it is "concerned that Liberty's delay in correctly underwriting the policy until after the policy term deprives its policyholders of their right to know prospectively what the correct premium is for insurance coverage." The letter also states that Liberty's practice is "at variance with the position of [the Plan's] Governing Committee," based on the attached letters from the Plan dated June 15, 2006 and July 26, 2006, and that the Department "expects that Liberty will comply with the attached ...letters."

The parties dispute the significance of the opinions of the Governing Committee and the Department of Insurance to the issues in this litigation. Plaintiffs claims that these opinions are binding and require that they be charged based on the premiums as initially quoted. Liberty, on the other hand, asserts that these opinions address only the application of the experience factor and are irrelevant to

²The Governing Committee and the Superintendent of Insurance administer the Plan and the Governing Committee has the authority "to establish for the benefit of applicants standards of service of participating insurers..." Insurance Law §§ 5301(b); 5302(b). See Premins v. Travelers Indem Co., 37 AD2d 799 (2d Dept 2007)(noting that the Superintendent of Insurance and the Governing Committee have established a comprehensive regulatory scheme which governs the rights and liabilities of the parties to assigned risk plan contracts."

³While the June 15, 2006 letter references "both insured" the July 26, 2006 letter clarifies that the letter addresses the three policies at issue here.

increases based a territory and vehicle classification. Liberty also argues that notwithstanding these opinions, it is still obligated to collect premiums from plaintiffs in accordance with the Plan and its manuals, which it alleges are the basis for the increased amounts. Finally, Liberty argues that these opinions relate only to whether it met the performance standards under the Service Carrier Agreement so as to be entitled to compensation.

In this motion, plaintiffs seek certain discovery from Liberty, including documents and interrogatory answers relating to communications with the Plan, the Department of Insurance, and any other regulators regarding the application of the experience factor, territorial codes and vehicle classifications which resulted in significant increases of premiums for plaintiffs and other ambulette operators insured by Liberty, and any fines imposed on Liberty as a result of its failure to comply with performance standards under the Plan. Plaintiffs also seek discovery regarding lawsuits in which Liberty sued other ambulette operators to recover increased premiums and other charges, as well as other information relating the calculation of premiums for these other ambulette companies.

Plaintiffs next request "loss information" with respect to losses for the two prior policy years contained in claim files for the policies issued to plaintiffs, including electronic claim notes, asserting that such loss information is relevant to calculating the experience rating. Plaintiffs further seek any communications, analysis or materials about a so-called Q-T Mini Bus decision which allowed ambulette vehicles to qualify for a lower-rated vehicle classification. Plaintiffs also seek a so-called statutorily required fraud plan filed with the Department of Insurance for the years 2004-2005. Plaintiffs further argue that Liberty improperly withheld documents identified in its privilege logs, and requests that the court conduct an in-camera inspection of these documents.

In opposition, Liberty argues that much of the discovery sought by plaintiffs is irrelevant to any

defense relating to its breach of contract counterclaims, which are the only claims remaining in this action. In particular, Liberty argues that contrary to plaintiffs' position, evidence related to other ambulette companies from which Liberty seeks increased premiums is not discoverable since these amounts are calculated pursuant to the terms of the Plan and its manuals, and required under Insurance Law section 214, and points out that the policies specifically state that Liberty may adjust the premium obligation accordingly. Furthermore, Liberty asserts that information regarding lawsuits against other ambulette companies is not relevant and in any event is publically available.

Liberty also asserts that to the extent plaintiffs seek information to show that Liberty was negligent in handling, defending or settling claims arising under plaintiffs' policies, such information is irrelevant since negligence is not a defense to its breach of contract counterclaims, and does not constitute any breach of an implied duty of good faith.

Liberty next contends that it has already produced documents relating to (i) all communications with the Plan relating to plaintiffs, (ii) loss information as to claims arising under plaintiffs' policies, including work sheets concerning the calculation of the experience factor used by Liberty, and loss runs, and (iii) the policies at issue, including underwriting files, audit files and files maintained by Liberty employees, with the exception of the claims files which were made available to plaintiffs' attorneys for review at the claims offices where they are located.

Additionally, Liberty argues that discovery regarding any analysis by it of the QT Bus case, which does not relate to plaintiffs, is irrelevant since waiver and estoppel are not defenses to its counterclaims, but that any mention of the decision in connection with plaintiffs would be in the underwriting file which has been produced. Liberty further maintains that as information regarding performance standards set for Liberty relates to invoices and administration of policies issued pursuant

to the Plan and are designed to protect the Plan, such information is neither material or relevant to the issue in this action. Liberty next asserts that as fraud is not an issue in this litigation, its fraud plan filed with the Department of Insurance is not discoverable. Liberty also contends that the documents set forth in its privilege log are protected from disclosure.

In reply, plaintiffs argue, *inter alia*, that communications with regulators are relevant to whether Liberty's actions in increasing the premiums retroactively were permissible, that underwriting manuals and field manuals describing internal procedures for rating assigned risk during the relevant time period is material to the calculation of the premiums, and that documents regarding performance standards, including fines imposed, are discoverable as is information regarding Liberty's handling of claims which bears on whether Liberty should have known earlier that the incorrect territory codes had been applied to the ambulettes.

Discussion

CPLR 3101(a) provides that “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The words “material and necessary” are “liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial.” Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to “evidence directly related to the issues in the pleadings.” Allen v. Crowell-Collier Publishing Co., 21 NY2d 403, 408 (1968).

Under this standard, plaintiffs are entitled to a substantial part of the discovery they seek. As a preliminary matter, while the court recognizes that the insurance law prohibits any deviation from the Plan and its manuals in calculating premiums (American Motorist Ins. Co. v. New York Seven-Up Bottling Co., Inc., 18 AD2d 36, 38 (1st Dept 1963), *aff'd*, 13 NY2d 1157 [1964]; Insurance Law § 214),

at issue here is the propriety of the methods employed by Liberty to retroactively increase plaintiffs' premiums based, inter alia, on the application of the experience factor, changed territory codes and vehicle reclassifications. Thus, plaintiffs are entitled to obtain discovery regarding the basis for the application of these methods as requested in plaintiffs' document demands nos. 19,20, 22,23,24, 25,33, 30, 42, 48 and 50 of plaintiffs' document demand dated April 12, 2006.

As to the opinions and other materials from regulators regarding the propriety of the amounts charged, while Liberty takes the position that this information is irrelevant, this position is disputed by plaintiffs. At a minimum, this information will assist in sharpening the issues at trial (Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d at 258), and discovery of this information is ordered, including performance reviews, and fines imposed, and any correspondence or other documents and filings between the regulators, including the Department of Insurance fraud bureau and the Plan's SIU unit, and Liberty regarding plaintiffs' policies.

With respect to discovery regarding other ambulette companies, including lawsuits in which Liberty seeks to collect premiums, the court notes that under the liberal discovery principles, discovery of other similar incidents or claims is permitted as long as the requested information is sufficiently material and relevant and not unduly burdensome and overly broad. See Austin v. Calhoon, 51 AD2d 958 (1st Dept 1976); Goldberg v. Blue Cross of Northeastern New York, Inc., 81 AD2d 995 (3d Dept 1981); Rodolitz v. Beneficial Nat. Life Ins. Co., 41 AD2d 707 (1st Dept 1973); Campbell v. State of New York, 105 Misc2d 204 (Ct Claims 1980).

Here, while the overall method of calculating the increased premiums for similarly situated ambulette companies for the relevant time period may assist plaintiffs in their defense of Liberty's counterclaims, insofar as each calculation of the premium is derived from the particular set of

circumstances for each ambulette company, detailed information regarding these calculations, as opposed to the general methods used, would not be relevant. Thus, correspondence and other documents and filings reflecting communications between regulators and Liberty regarding the method of calculating premiums for other ambulette companies from which Liberty sought a similarly increased premium are material and must be provided to plaintiff. With respect to any actions involving Liberty and other ambulette companies regarding the increased premium, Liberty must provide plaintiffs with the name of each action, the index number and the county in which it is pending. While these actions may have some bearing on the method used to calculate premiums, it would be unduly burdensome to require Liberty to provide further information regarding these actions, which are publically filed.

The next issue concerns plaintiffs' requests for Liberty's claim files and loss information, including electronic claim notes, which plaintiffs assert are relevant for determining whether Liberty properly calculated the experience factor in light of the claims arising during the relevant policy periods. Liberty counters that it has provided plaintiffs "loss runs" and worksheets used in calculating the experience factor, and that it would be unduly burdensome to provide the claims files, particularly as any allegation that the increased premium was the result of Liberty's negligence or breach of an implied covenant of good faith in fair dealing is not a defense to its breach of contract claims.

In general, negligence is not a defense to a breach of contract claim (Viacom Intern'l v. Midtown Realty Co., 235 AD2d 332 [1st Dept 1997]) and where an insurer seeks to collect an increased retrospective premium it has been held that New York does not recognize a defense for breach of an insurer's implied covenant of good faith and fair dealing based on the insurer's alleged failure to reasonably investigate claims. Insurance Company of Greater New York v. Glen Haven Residential Health Care Facility, Inc., 253 AD2d 378 (1st Dept 1998). That being said, however, an insurer, like

every party obligated to perform services under a contract, is required to do so in an “objectively reasonable manner under the circumstances.” Commissioner of State Ins. Fund v. Photocircuits, Corp., 20 AD3d 173,181 (1st Dept 2005)(internal citation and quotation omitted). In Commissioner of State Ins. v. Photocircuits, Corp., the First Department held that evidence that an insurer did not “even minimally comply with its basic obligation to perform in a reasonable manner” precluded a grant of summary judgment in the insured’s favor on its claim for retrospective premiums. Id. at 182.

Thus, information in claims files for policies issued to plaintiffs regarding the claims underlying the calculation of the experience factor is discoverable. However, given the extensive nature of the claims files and that the bulk of the information in the files appears to be irrelevant to this action, Liberty shall provide plaintiffs with the electronic claim notes for every claim over \$25,000 which was used to calculate the experience factor, without prejudice to plaintiffs seeking further information.

Liberty shall also be required to provide plaintiffs with those portions of its underwriting manuals and field manuals that describe internal procedures for rating assigned risk during the relevant time period. With respect to the QT Bus decision, production of the underwriting file for plaintiffs containing references to the decision and how it related to plaintiffs is sufficient, except that Liberty shall also respond to interrogatories inquiring as to its knowledge of the QT Bus decision. Next, plaintiffs have not shown how the production of Liberty’s 2004-2005 fraud plan bears any relevance to the issues in this action.

With respect to the interrogatories, Liberty shall supplement its response to the second set of interrogatories in accordance with this decision and order taking into account the clarifications and comments in the August 23, 2006 letter from plaintiffs’ counsel, which is annexed as Exhibit H to its moving papers.

The remaining issues relate to the documents withheld by Liberty as privileged and identified in Liberty's privilege logs. Plaintiffs assert that Liberty has not met its burden of demonstrating that the documents identified by Liberty in three privilege logs are privileged as attorney-client communications and/or as attorney work-product or subject to a conditional privilege as materials prepared in anticipation of litigation

Liberty counters with the affirmation of James Fuchs, Esq., who reviewed the documents in the privilege logs and states that all documents withheld on the grounds of attorney-client privilege contain communications relating to the solicitation of legal advice, and if communications were not directly with counsel they involved the dissemination of communications with counsel within Liberty. With respect to documents withheld based on work product, Mr. Fuchs states that these documents were prepared by Liberty or its counsel in anticipation of, or because of, this litigation. Liberty also relies on the affidavits from two in-house counsel, Michael J. Johnson and Thomas Stanley Hiers who are identified in the privilege logs as providing and receiving confidential documents and communications. Mr. Johnson and Mr. Hiers each describe their role at Liberty as serving "solely ...as attorney for various business units" and that any communications that they had regarding plaintiffs "would have involved the rendering of legal advice."

"Because of the strong public policy favoring full disclosure, the burden of proving each element of a privilege rests the party asserting it." Spectrum Systems Intern'l Corp. v. Chemical Bank, 157 AD2d 444, 447 (1st Dept 1990), aff'd as modified, 78 NY2d 371 (1991). "In order to raise a valid claim of [attorney-client] privilege, the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91

NY2d 848 (1997) . In addition, facts in a client's possession are not insulated from discovery simply as a result of being reported to counsel. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 NY2d 588, 594 (1989). Likewise, facts learned by an attorney from independent sources and then reported are not privileged. Kenford Co. v. County of Erie, 55 AD2d 466 (4th Dept. 1977).

An attorney's work product is entitled to absolute immunity (CPLR 3101 [c]), while materials prepared in anticipation of litigation are subject to a conditional privilege (CPLR 3101[d]). Corcoran v. Peat, Marwick, Mitchell and Co., 151 AD2d 443, 445 (1st Dept 1989). "Lawyer's interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product." Id.

At the same time, however, the work product privilege has been construed narrowly. Zimmerman v. Nassau Hospital, 76 AD2d 921, 922 (2d Dept 1980). Thus, to be shielded from discovery based on the work-product privilege, it must be shown that the materials in issue are "uniquely the products of a lawyer's learning or professional skills." Aetna Cas and Surety Co. v. Certain Underwriters at Lloyd's, 263 AD2d 367, 368 (1st Dept 1999), lv dismissed, 94 NY2d 875 (2000)(citations omitted).

In the corporate setting, a determination as to whether communications are protected by the attorney-client privilege or work product doctrine, is fact specific and involves an examination of the whether the communication is for legal as opposed to personal and/or business purposes, and this type of factual assessment would be necessary to determine if communications between non-attorneys in a corporation for the purpose of disseminating legal advice are privileged. Rossi v. Blue Cross and Blue Shield of Greater New York, 73 NY2d at 593; Charter One Bank, FSB v. Midtown Rochester LLC, 191 Misc2d 154, 166 (Sup Ct Monroe Co. 2002).

Under these principles, it cannot be determined based on the record before the court whether the withheld documents identified in the privilege log are protected from disclosure. Thus, Liberty shall be required to submit the documents identified in the three privilege logs for in camera inspection, together with a list identifying the title and business function of the person(s) sending and receiving the documents.

Conclusion


In view of the above, it is

ORDERED that plaintiffs' motion is granted to the extent of requiring Liberty to provide, in accordance with this decision and order, further responses to plaintiffs' interrogatories and discovery demands within 45 days of this decision and order; and it is further

ORDERED that Liberty shall provide to the court the documents identified in the privilege logs for in-camera inspection together with a list identifying the title and business function of the person(s) sending and receiving the documents on or before June 7, 2007; and it is further

ORDERED that a status conference shall be held on July 12, 2007 at noon in Part 11, room 351, 60 Centre Street, New York, NY 10007.

DATED: May 8, 2007



J.S.C.

FILED
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