

AMERICAN MUTUAL LIABILITY, INSURANCE COMPANY,
Plaintiff-Counterdefendant, v. BEATRICE COMPANIES, INC.,
Defendant-Counterplaintiff and Third Party Plaintiff, v.
TRANSPORT INSURANCE COMPANY, NATIONAL SURETY CORPORATION,
CALIFORNIA UNION INSURANCE COMPANY, ALLIANZ UNDERWRITERS,
INC., ARTHUR J. GALLAGHER & CO., GALLAGHER BASSETT INSURANCE
SERVICES, INC. and LIBERTY MUTUAL INSURANCE COMPANY, Third
party defendants.

Case No. 86 C 1874

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 1993

February 24, 1994, Docketed

JUDGES: [*1] Williams

OPINION: MEMORANDUM OPINION AND ORDER

American Mutual Liability Insurance Co. ("American Mutual") brought this declaratory judgment suit against Beatrice Companies, Inc. ("Beatrice") alleging that it was not obligated to defend or indemnify Beatrice for its defense costs in another lawsuit. Beatrice filed a third-party complaint against American Mutual and its various other insurers, including Liberty Mutual Insurance Co. ("Liberty Mutual") and California Union Insurance Co. ("Cal. Union"). This matter is before the court on Beatrice's motions to compel discovery from Liberty Mutual and Cal Union, and Cal Union's cross-motion for a protective order.

Background

In 1982, Beatrice was named as a defendant in *Anderson, et al. v. Cryovac, et al.*, No. 82-1672-S, which was then pending in the United States District Court for the District of Massachusetts. In *Anderson*, thirty-four plaintiffs alleged that Beatrice's subsidiary, John J. Riley Co. ("Riley") caused them cancer and other serious illnesses by contaminating their drinking water with toxic chemicals. On September 11, 1986, a jury returned a verdict for Beatrice. The final judgment for Beatrice [*2] was affirmed on appeal.

American Mutual brought this action in 1986 seeking a declaration that it was not liable for the defense costs and

related expenses incurred in *Anderson*. Beatrice then filed a third-party claim against its insurers. On June 29, 1989, the action was dismissed without prejudice and with leave to reinstate while appeals and subsequent issues were being resolved in the *Anderson* litigation. On March 26, 1993, this action was reinstated. n1

n1 Since this action was filed, American Mutual has become insolvent and has not participated in recent proceedings.

Motion to Compel

Federal rule of Civil Procedure 37(a) permits a party, upon reasonable notice, to apply for an order compelling discovery. As in all discovery matters, the court possesses broad discretion regarding whether to compel discovery. See generally 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*: §§ 2176, 2285 (1970). In evaluating this motion to compel, the court is guided by Rule 26(b)(1), which [*3] provides in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). The court rules as follows on the pending discovery motions.

I. Motion to Compel Discovery from Liberty Mutual

A. Document Requests

Beatrice moves the court to issue an order compelling Liberty Mutual to produce documents responsive to Request Nos. 3 and 4 of Beatrice's Third Request for Production of Documents. n2 Beatrice contends that these documents "reflect misrepresentations made by Liberty Mutual to insurance regulatory authorities" and "will evidence representations of Liberty Mutual that the pollution exclusion clause excluded coverage only if the pollution losses were expected or intended by the insured." (Motion to Compel Discovery ("Motion I") at 2). Beatrice claims this evidence is relevant to its argument that Liberty Mutual is estopped from advancing a contrary position in this case.

n2 Request 3 seeks "any letters, declarations, endorsements or other communications filed with or sent to the insurance regulatory authorities in any state to obtain approval for the use of the pollution exclusion endorsement to general comprehensive liability policies written and issued by Liberty Mutual prior to 1973." Request 4 seeks "all training manuals, sales literature or other such documents prepared by Liberty Mutual discussing the effect of coverage under a general comprehensive liability policy as a result of the pollution exclusion endorsement on policies written and issued prior to 1973." (Motion I, Ex. A).

[*4]

Originally, Liberty Mutual objected on the grounds of overbreadth, undue burden, and relevancy. In its response brief, Liberty Mutual contends that the requested documents are irrelevant because, under Massachusetts law, a court cannot look to extrinsic evidence to interpret unambiguous contract terms. (Response to Motion to Compel Discovery ("Liberty Response") at 2-4). Liberty Mutual also argues that "Beatrice has not and cannot establish that John J. Riley Co. was aware of the industry-related documents, or that it had a justified expectation . . . that the insurance contracts at issue would incorporate the positions, attitudes and interpretations set forth in the industry related documents." (Liberty Response at 5).

As Beatrice correctly notes, Liberty Mutual's argument regarding extrinsic evidence and contract interpretation is inapposite. The doctrine of equitable estoppel might preclude Liberty Mutual from relying on its allegedly

unambiguous language if Beatrice reasonably relied on material misrepresentations to the contrary. Therefore, Beatrice' request to compel Liberty Mutual to comply with document requests 3 and 4 is granted.

B. Designation of a Representative [*5] under Fed. R. Civ. P. 30(b)(6)

Beatrice also seeks an order requiring Liberty Mutual to designate a representative pursuant to Rule 30(b)(6) n3 to testify as to "Liberty Mutual's awareness or involvement with the Anderson case at any time" as requested in Beatrice's Second Notice of Deposition. n4 (Motion I at 3). Beatrice argues that the testimony sought will establish that Liberty Mutual had actual notice of the claims asserted against Beatrice in Anderson, and suffered no prejudice relating to the date upon which Beatrice gave notice.

n3 If a party names an organization as a deponent, Rule 30(b)(6) requires that "the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. . . ." Fed. R. Civ. P. 30(b)(6).

n4 The Rule 30(b)(6) request also seeks information on Liberty Mutual's (1) policies, procedures, and litigation strategies in toxic tort cases, (2) decision to deny coverage or reserve its rights in Anderson, (3) procedures to store and retrieve policy information, (4) discovery of the policy issued to John J. Riley Co. (5) the contents of the policy issued to John J. Riley Co. and forms used by the company prior to 1973. (Motion I, Ex. B).

[*6]

Liberty Mutual objects on several grounds. First, Liberty Mutual argues that its awareness of the Anderson case is irrelevant because Beatrice had an obligation to provide timely notice irrespective of whether Liberty Mutual gained independent knowledge. (Liberty Response at 7-8). Liberty Mutual also contends that it did suffer actual prejudice because Beatrice seeks fees resulting from its actions in Anderson although Liberty Mutual had no control over the litigation and was not allowed to assist in the trial strategy. In addition, Liberty Mutual claims that some of the requested information is privileged because it involves communications between policyholders and their attorneys and work-product. (Liberty Response at 8).

Under Massachusetts law, n5 when an insurance

company attempts to be relieved of its obligations under an insurance policy on the grounds of untimely notice, the insurance company is required to prove that the notice provision was breached, and that the breach resulted in prejudice. *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 409 N.E.2d 185, 188 (Mass. 1980). Therefore, violation of a policy provision bars [*7] coverage only where the breach frustrates the purpose underlying the provision such as preventing an insurer from protecting its interests. See *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 571 N.E.2d 357, 361 (Mass. 1991).

n5 Both Beatrice and Liberty Mutual agree that Massachusetts law governs the contract.

Since the requested information such as Liberty Mutual's actual knowledge goes to its ability to protect its interests in the Anderson case, this information is discoverable because it "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Moreover, Liberty Mutual's anticipatory blanket assertion that such information "would compromise any confidentiality and privilege attached to the documents" is insufficient to preclude this discovery. Liberty Mutual must specifically indicate how the answers to particular questions and document requests are privileged under the attorney-client or work product privileges. [*8] Consequently, the court grants Beatrice's Rule 30(b)(6) request, and will assess any privilege problems as they arise.

II. Motion to Compel Discovery and Cal Union Cross-Motion

Beatrice requests that the court require Cal Union to produce documents responsive to Request Nos. 1 and 2 of Beatrice's Third Request for Production of Documents. n6 Beatrice claims that the documents relate to Cal Union's contention that its policies do not cover defense costs. Specifically, Beatrice "anticipates that the documents sought will evidence claims submitted to Cal Union in which it paid defense costs incurred by Beatrice and will, therefore, be relevant to interpretation of the Cal Union policies in regard to whether or not defenses [sic] costs are included within the scope of coverage." (Motion to Compel Discovery ("Motion II") at 2).

n6 Request 1 asks for "all files regarding any claims for which California Union issued a payment of any kind to its insured or to any third party under either of the policies." Request 2 seeks production of "all claim files regarding

claims made under either of the policies." (Motion II, Ex. A).

[*9]

Cal Union objects on several grounds and seeks a protective order precluding this discovery. n7 First, Cal Union argues that the information sought is irrelevant under Illinois law n8 because it is improper to resort to extrinsic evidence where the contract provisions are clear and unambiguous. (Cal Union Memo n9 at 1, 7). Moreover, Cal Union states that it has moved for summary judgment because (1) there is no duty to defend because there was no prompt written notice, (2) an excess carrier has no duty to defend under Illinois law, (3) the policy language unambiguously negates a duty to defend and to pay defense costs. (Orbon Aff. at 4-5). Cal Union also claims that the request is untimely because Beatrice never sought to expand discovery of claims beyond those involved in Anderson until the case was reinstated. n10 (Cal Union Memo at 1). Lastly, Cal Union claims that the discovery request is overly broad, will cause unnecessary delay, and will require time-consuming reciprocal discovery. In sum, Cal Union seeks a protective order or stay of Beatrice's request until the summary judgment motion is resolved. n11

n7 Rule 26(c) provides that upon a party's motion, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c).

[*10]

n8 The parties apparently agree that Illinois law applies to the Cal Union insurance contract.

n9 Memorandum of Law in Opposition to Beatrice Companies, Inc.'s Motion to Compel and in Support of California Union Insurance Company's Motion for Protective Order.

n10 Beatrice claims that any delay is because Cal Union first advised Beatrice of its position that its policies do not cover defense costs on April 26, 1993. (Memorandum of Beatrice Companies, Inc. in Opposition to Cal Union's Motion for Protective Order and in Further Support of Beatrice's Motion to Compel Discovery ("Beatrice Reply") at 2).

n11 Beatrice would have no objection to an order staying discovery while the court considers the late notice defense, but objects to the court's "consideration of the issue of Cal Union's indemnity obligations for defense costs without the evidence of the parties' actual course of conduct under the policies before it." (Beatrice Reply at 6).

Despite Cal Union's argument about the irrelevance of extrinsic evidence, the Seventh Circuit has noted that "Illinois has largely rejected the [*11] traditional rule . . . which holds that if a contract is clear 'on its face,' no other evidence may be introduced to contradict its terms." *R.T. Hepworth Co. v. Dependable Ins. Co.*, 997 F.2d 315, 318 (7th Cir. 1993). Although "extrinsic evidence cannot be used to create a conflict completely apart from the contract itself," it may be relevant to whether the contract is, in fact, ambiguous. *Id.* The court cannot say at this juncture that evidence that Cal Union did pay defense costs is irrelevant to policy language disclaiming such obligation.

Despite the fact that Cal Union has a potentially dispositive summary judgment motion pending, staying this motion is not an attractive alternative since this case was first begun almost eight years ago. In addition, the

court would prefer to have all potentially relevant evidence available when it rules on each party's summary judgment motion rather than proceed in a piecemeal fashion. Further, the court is not persuaded that the request is unduly burdensome and Beatrice represents that its claims administrator, Gallagher Bassett, has any documents that Cal Union might require for reciprocal discovery. (Reply [*12] at 3, 6 n.1). Therefore, Beatrice's motion to compel discovery is granted.

Conclusion

For the foregoing reasons, Beatrice's motions to compel discovery from Liberty Mutual is granted, and Beatrice's motion to compel discovery from Cal Union is also granted. Cal Union's cross-motion for a protective order is denied.

ENTER:

Ann Claire Williams, Judge

United States District Court

Dated: FEB 18 1994