

MISSOURI PACIFIC RAILROAD COMPANY, as successor-in-interest to MISSOURI-KANSAS-TEXAS RAILROAD COMPANY and its subsidiaries and affiliates, Plaintiff, VS. AETNA CASUALTY & SURETY CO., et al., Defendants.

Civil Action No. 3:93-CV-1898-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

**November 6, 1995, Decided
November 6, 1995, Filed; November 7, 1995, Entered**

DISPOSITION: AFFIRMED in part; DISMISSED in part.

COUNSEL: For MISSOURI PACIFIC RAILROAD COMPANY, plaintiff: Ralph H Duggins, Attorney at Law, Shayne Daniel Moses, Attorney at Law, Clifton Matthew Terrell, Attorney at Law, Cantey & Hanger, Fort Worth, TX USA. Theodore R Tetzlaff, John H Mathias, Jr, Attorney at Law, Robert S Markin, Richard J Gray, Attorney at Law, Brent D Stratton, Attorney at Law, Jenner & Block, Chicago, IL USA. Dan Mahanay Boulware, Attorney at Law, MacLean & Boulware, Cleburne, TX USA.

For AMERICAN CASUALTY CO OF READING PENNSYLVANIA, CONTINENTAL CASUALTY COMPANY, defendants: Robert Lynn Fielder, Attorney at Law, Fisk & Fielder, Dallas, TX USA. Jim Greene, Brownly Greene & Walsh, Washington, DC, USA. Caroline A Leonard, Attorney at Law, James W Greene, Attorney at Law, Bromley Greene & Walsh, Washington, DC USA.

For AMERICAN HOME ASSURANCE CORP, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY STATE OF PENNSYLVANIA, LEXINGTON INS CO, NEW HAMPSHIRE INSURANCE COMPANY, defendants: Richard W Bryan, Louis Edward Dolan, Jr, Attorney at Law, Gregory Howard Horowitz, Attorney at Law, Jackson & Campbell, Washington, DC USA.

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For EMPLOYERS SURPLUS LINES INSURANCE CO, defendant: Don D Martinson, Attorney at Law, Cecily Shull Ticer, Attorney at Law, Fanning Harper & Martinson, Dallas, TX USA.

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For LIBERTY MUTUAL INSURANCE COMPANY, defendant: Werner Anthony Powers, Attorney at Law, David Ross Noel Taubenfeld, Attorney at Law, Haynes & Boone, Dallas, TX USA.

For INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, defendants: Kenneth W Biermacher, Attorney at Law, Kane Russell Coleman & Logan, Dallas, TX USA.

For CIGNA SPECIALTY INSURANCE COMPANY, defendant: David Lawrence Peavler, Attorney at Law, Locke Purnell Rain Harrell, Dallas TX USA.

For KATY INDUSTRIES, W J SMITH WOOD PRESERVING COMPANY, third-party defendants: Michael S Mostow, Attorney at Law, Holleb & Coff, Chicago, IL.

For CALIFORNIA UNION INSURANCE COMPANY, cross-claimant: Andrew H Marks, Attorney at Law, Mi-

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For EMPLOYERS SURPLUS LINES INSURANCE CO, cross-claimant: Don D Martinson, Attorney at Law, Cecily Shull Ticer, Attorney at Law, Fanning Harper & Martinson, Dallas, TX USA.

For CALIFORNIA UNION INSURANCE COMPANY, cross-claimant: Andrew H Marks, Attorney at Law, Michael J Zoeller, Attorney at Law, Crowell & Moring, Washington, DC USA.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION

MEMORANDUM OPINION AND ORDER

This appeal from an order of the magistrate judge presents the question whether *Fed. R. Civ. P. 26(a)(1)(D)* mandates the production of reinsurance policies. Concluding that it does, the order is affirmed. The court otherwise dismisses the appeal because it requests an advisory opinion.

I

This is an action by plaintiff Missouri Pacific Railroad Company ("MoPac"), as successor-in-interest to Missouri-Kansas-Texas Railroad Company ("M-K-T") and its subsidiaries and affiliates. MoPac has sued several defendants, contending they are general liability insurers who insured M-K-T for environmental liabilities.

During the discovery process, MoPac filed a motion to compel the production of certain documents, including *inter alia* certain reinsurance policies, and the production of information relating to the insurers' claims-handling process. The magistrate judge ordered the production of reinsurance policies on the ground that *Rule 26(a)(1)(d)* mandates production. In doing so, he noted that "confidentiality with regard to the identity of reinsurers and the terms of reinsurance policies may be appropriate[.]" Order at 4. In addition, the magistrate judge ordered the production of documents relating to "how an insurance company treated [MoPac's] claim and the procedures used to determine whether an occurrence presented in a claim was within the coverage described in the contract." *Id.* at 3.

Defendants Employers Surplus Lines Insurance Company ("ESLIC")¹ and Cigna Specialty Insurance Company ("CIGNA Specialty") object to the order as it relates to the production of reinsurance policies and

claims-handling information. They contend that *Rule 26(a)(1)(D)* does not require production of reinsurance policies, and even if it does, MoPac is seeking the documents purely for purposes of harassment. Defendants also contend that claims-handling information is not relevant to MoPac's causes of action.

I ESLIC'S objection notes that American Casualty Company of Reading ("ACCR"), Continental Casualty Company ("CCC"), and American Re-Insurance Company join in its objection. In its response, MoPac represents that it has settled with ACCR and CCC.

II

This court reviews decisions of the magistrate judge in nondispositive matters pursuant to Rule 72(a). Rule 72(a) provides that the court "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law."

The magistrate judge's legal conclusions are freely reviewable. *Smith v. Smith*, 154 F.R.D. 661, 665 (N.D. Tex. 1994). The district judge applies a *de novo* standard, and reverses if the magistrate judge erred in some respect in her legal conclusions. *Id.*

The question of whether *Rule 26(a)(1)(D)* applies to reinsurance policies presents a question of law because it involves interpretation of the Rule. Accordingly, the court applies a *de novo* standard of review.

Rule 26(a)(1)(D) provides, in pertinent part:

a party shall, without awaiting a discovery request, provide to other parties:

for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

When an insurer "cedes" a portion of its risk to a reinsurer, the reinsurer agrees to indemnify or reimburse the insurer according to the contractual terms. The court agrees with the magistrate judge's holding that the Rule mandates disclosure of reinsurance policies because "by definition such policies would render a reinsurer liable for all or part of an adverse judgment entered against the primary insurer which obtained the reinsurance policy." Order at 4.

Defendants rely on *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 1991 U.S. Dist. LEXIS 16336, 1991 WL 237636 (E.D. Pa. 1991), for the proposition that "some declaratory judgment actions" do not mandate the disclosure of reinsurance contracts. *Rhone-Poulenc* states that "only when money damages are sought for which the insurer (or reinsurer) may become liable are the agreements automatically discoverable[.]" *Id.* at *2. In addition to its claim for declaratory relief, MoPac seeks monetary damages for breach of contract. The case supports the magistrate judge's order.

Alternatively, defendants contend that reinsurance contracts are extremely confidential, and MoPac allegedly seeks the documents solely to harass them. The court declines to consider this objection because it is not ripe. The magistrate judge recognized that confidentiality regarding the identity of reinsurers and the terms of the policy may be appropriate. Defendants' confidentiality objection deals with the scope of disclosure, and defendants have failed to show an adverse ruling by the magistrate judge on this issue. Accordingly, the court affirms this aspect of the magistrate judge's order.

III

Defendants contend the magistrate judge erred by ordering the production of evidence relating to claims-handling. They posit that such information is irrelevant, but they represent to the court that they base their objection solely on the correctness of the magistrate judge's decision. "Additionally, in order to avoid a waste of the Court's time, Defendant ESLIC discloses that with regard to its records, no additional documents responsive to this request exist. ESLIC² objects to this portion of the order solely because it believes that the Order is legally incorrect and clearly erroneous." Ds. Obj. at p. 6.

2 The excerpt is from ESLIC's brief, but CIGNA Specialty joined in the brief.

This court does not render advisory opinions. Accordingly, defendants' objection to the production of documents relating to claims-handling is dismissed.

AFFIRMED in part; DISMISSED in part.

November 6, 1995.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE