UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

THE REGENCE GROUP, REGENCE BLUESHIELD, REGENCE BLUECROSS BLUESHIELD OF OREGON, REGENCE BLUESHIELD OF IDAHO, AND REGENCE BLUECROSS BLUESHIELD OF UTAH,

Plaintiffs,

v. Civil No. 07-1337-HA

TIG SPECIALTY INSURANCE COMPANY, ORDER

Defendant.

HAGGERTY, District Judge:

This Order addresses pending discovery motions, including requests to reconsider the court's denial of a protective order concerning subpoenas to defendant's reinsurers, and requests to appoint a Special Master to resolve the remaining discovery disputes. Most of the pending motions and requests are resolved below. The remainder will be addressed by separate Order.

BACKGROUND

Plaintiffs (also referred to as "Regence") are five corporations headquartered in four different states. Regence brought this action against TIG Specialty Insurance Company (TIG, or defendant) alleging claims for breach of contract, declaratory relief, breach of the duty of good faith and fair dealing, fraudulent misrepresentation, fraud in the inducement, and bad faith.

Plaintiffs seek a declaration that defendant is obligated to pay defense and indemnity costs related to three lawsuits. Two of the suits were brought in the Southern District of Florida by physicians and healthcare providers asserting civil claims derived from the Racketeer Influenced and Corrupt Organizations (RICO) Act against Regence and other Blue Cross/Blue Shield entities: *Thomas, et al., v. Blue Cross Blue Shield Assoc., et al.*, Case No. 03-21296 (*Thomas*), and *Solomon et al., v. Blue Cross and Blue Shield Assoc. Et al.*, Case No. 03-22935) (*Solomon*). The third suit was filed in Washington Superior Court for Pierce County and involves similar state law claims brought against Regence by Washington physicians: *Tacoma Orthopedic Surgeons, et al., v. Regence Blueshield, et al.*, Case No. 02-2-05982-7 (*Thomas*).

Regence seeks defense costs and indemnification for a settlement paid in the *Thomas* suit, and defense costs incurred in the *Solomon* and *Tacoma* cases. Defendant paid defense costs in these suits from November 2004 until August 2007. Defendant advances a counterclaim seeking recovery of defense costs paid by defendant after August 20, 2007.

On May 1, 2009, this court denied defendant's motion for a protective order that would have shielded documents relating to positions defendant took with its reinsurers in the ordinary course of business (and during arbitrations) for purposes of ensuring coverage from the reinsurers for Regence's claims. This court concluded that defendant (and the reinsurer third parties) failed to meet the burden of establishing that specific prejudice or harm would result in the absence of the protective orders requested, and that there had been no threshold showing of appropriate circumstances warranting such protection. Since that ruling, there have been multiple motions filed, arising primarily out of defendant's disagreement with the ruling.

MOTIONS

1. Motion to Reconsider [175]

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Defendant moves for reconsideration and clarification of the May 1, 2009 ruling, or certification of issues in that ruling for an interlocutory appeal [175]. After considering defendant's arguments, plaintiffs' responsive briefing, and the record, this court concludes that defendant's motion is denied in part and granted in part for the limited purpose of attempting to provide defense counsel with the requested clarification.

The aspects of the motion that seek an amendment to the prior ruling, or certification for appealing the ruling, are denied. The court has reviewed the authorities defendant now advances in the reconsideration motion. These cases, *Transamerica Computer Co., Inc. v. IBM*, 573 F.2d 646 (9th Cir. 1978) (*Transamerica*) and *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (*Gomez*), fall well short of being "newly discovered evidence" or reflecting an "intervening change in controlling law," and defendant's failure to cite the decisions earlier presents insufficient cause to grant reconsideration now. *Adidas America, Inc. v. Payless Shoesource, Inc.*, 540 F. Supp. 2d 1176, 1184 (D. Or. 2008).

Moreover, those decisions fail to compel the conclusion defendant seeks – that if a party is compelled to produce documents, there is no waiver of privilege, provided reasonable steps had been taken to protect confidentiality. The *Transamerica* decision addressed the inadvertent production of privileged documents in expedited, complicated discovery proceedings, and whether that inadvertent production should constitute a waiver of applicable privileges in an unrelated case (it does not). 573 F.3d at 648-51. The *Gomez* decision concluded that prisoners who were compelled to store privileged documents in an area in which prison employees accessed the documents had not waived applicable privileges. 255 F.3d at 1133. Plainly, these cases share little in common with the facts presented here. This court's prior conclusion stands –

that if documents at issue here ever were privileged, defendant expressly or impliedly waived that privilege.

Defendant's argument regarding the court's interpretation of the decision in *AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052, 2008 WL 5062030 (S.D.N.Y. November 25, 2008) is also unpersuasive. This court acknowledged *AIU's* conclusion "that an insurance company can be construed as waiving any privilege if it has shared its counsel's documents with a reinsurer when the parties' interests are not aligned." Order of May 1, 2009 at 4 (citation omitted). Defendant's subsequent commentary regarding aspects of the *AIU* decision fails to diminish the propriety of this court's reliance upon *AIU* for the general principle stated. Defendant's continued disagreement with this court's conclusion, even coupled with other aspects of the *AIU* decision which defendant construes favorably to its position, is insufficient to warrant reconsideration. Defendant's motion provides no basis for altering the court's conclusion that the scope of the discovery is reasonable and proper.

Defendant also requests clarification, asking whether the court's ruling extends to documents concerning the underlying litigation exchanged before any dispute arose between defendant and the reinsurers, and whether the ruling include documents exchanged after defendant and the reinsurers settled their disputes. Dft. Mem. Supp. at 8.

To clarify, the court's earlier Order approved – without reservation – Regence's requests for discovery, including:

1. The reinsurance policies that defendant purchased covering the Regence policy at issue or underlying litigation that is at issue;

2. Documents exchanged between defendant and its reinsurers about that underlying litigation;

3. Documents relating to coverage for the underlying litigation "exchanged with an opposing party or the arbitrators as part of the arbitrations [defendant] had with its reinsurers;"

and

4. Documents relating to the payments received by defendant from its reinsurers in connection with settlement of claims for coverage for the underlying litigation.

Order of May 1, 2009 at 3 (citation omitted).

The scope of this discovery is not restricted to temporal limitations pertaining to when disputes arose between defendant and the reinsurers, or when those disputes were settled. The scope of discovery includes all documents related to the policy at issue, and defendant's reinsurance claims for the Regence matters.

Defendant's additional inquiry regarding the confidentiality of certain discovery appears to be tactical. Plaintiffs have demonstrated consistent willingness to abide by confidentiality requests and to agree to reasonable protective orders. Defendant's renewed concerns about confidentiality is no basis for delaying the production of non-privileged discovery or refusing to negotiate appropriate protective orders with opposing counsel in good faith.

Finally, this court rejects defendant's request for certification. Pursuant to 28 U.S.C. § 1291, appellate review is postponed until after a final judgment has been entered by a district court. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b) carves a limited exception to this final judgment rule, allowing a district court to certify an order for interlocutory appeal if: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Ninth Circuit has held that this exception "is to be applied sparingly and only in exceptional circumstances." *United States v. Woodbury*, 263 F.2d 784, 799 n.11 (9th Cir. 1959). It was "not intended merely to provide review of difficult rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Interlocutory appeals should be limited to "rare circumstances." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). Such "rare circumstances" are absent here.

2. Plaintiffs' Motion [181] and WellPoint's Motion [182] For a Protective Order

The court has scrutinized the movants' protective orders that were proposed in accordance with this court's subsequent instructions, as well as defendant's objections and counter-proposal. The court agrees that the proposals from plaintiffs and WellPoint go beyond the scope presented in this court's Order of May 5, 2009, in which counsel were instructed that "[p]ursuant to the terms of this Order, the Intervenors shall file proposed Protective Orders that limit the scope of defendant's discovery to the parameters offered and described by defense counsel in the Combined Response."

To the extent that those proposals foreclose defendant from seeking additional discovery, waives any requirement for maintaining a privilege log, or mandates that defendant pays the cost of production, those proposals are erroneous. Accordingly, the motions for protective orders from plaintiffs and from WellPoint [181, 182] are denied.

Counsel are ordered to confer again for the purpose of agreeing upon a final appropriate protective order. Preferably, counsel will succeed in submitting a joint proposal. If counsel cannot resolve their differences, each party shall file a proposal. The proposal or proposals must be filed by February 26, 2010.

3. Motions to Compel [192; 196]

Plaintiffs move to compel information relating to reserves [192]. Defendant moves to compel production [196], asserting that plaintiffs continue to delay their discovery obligations.

Defendant's motion was filed prematurely. That motion is denied.

Plaintiffs' motion regarding reserves requires additional analysis. Counsel demonstrated some cooperation regarding this motion, but were unable to reach a resolution. Defense counsel urged the court to deny plaintiff's motion as moot because the parties had agreed to reserve their rights regarding the admissibility of the discovery, defendant already agreed to produce the discovery, and the parties had agreed to treat the discovery as confidential.

Plaintiffs filed supplemental briefing indicating that – although counsel were negotiating – the parties lacked any agreement about the production of information pertaining to defendant's reserves, and plaintiffs preferred that the court hold the motion to compel in abeyance.

Subsequently, plaintiffs reported that defendant had produced sixty-four pages of related discovery, but despite engaging "in a constructive dialogue to try to reach an agreement, the parties continue to disagree about several issues, including the proper scope of [defendant's] production relating to reserves and [defendant's] ability to redact documents relating to reserves." Second Supp. Statement at 2.

Defendant also acknowledged that counsel have differing ideas on the scope and nature of the production of reserve information. Dft's Supp. Statement at 2.

Counsel's efforts at cooperation broke down significantly following these submissions. The court has examined the record and concludes that plaintiffs' motion to compel information about defendant's reserves is well-taken. In light of the indications that defendant has

acknowledged that this information is discoverable, but then has obstructed its production, defendant is ordered to produce all documents relating to reserves established for the underlying actions. This production shall be complete by March 12, 2010. Counsel shall confer and attempt to cooperate with this production as expeditiously as possible. Sanctions will be calculated and assessed against any counsel shown to have caused any further, unwarranted delay in the production or resolution of these discovery matters.

4. Plaintiffs' Motion to Compel and to Strike Defendant's Partial Summary Judgment Motions [230]

In a frank acknowledgment of the frustrations experienced in the prosecution of this litigation, plaintiffs move to compel depositions and to strike pending summary judgment motions advanced by defendant. Plaintiffs also seek an award of attorney fees and costs. This motion is granted in part.

The deposition delays cannot be rationalized. Defendant first suggests that the motion was "premature" because the blizzard of other motions and requests for reconsideration that has been advanced were still under advisement by the court. Defendant hints that rulings in those "pending matters" would assist in determining whether defendant has to cooperate with scheduling depositions.

Defendant's posture regarding its cooperation concerning depositions appears to be that resolution of the other "pending matters" in this litigation was first necessary. The court advises counsel strongly that cooperation and professional conduct is expected at all times, regardless of the number of motions pending or counsel's desires for reconsideration of past rulings. This court agrees with plaintiffs that in light of the protracted delays and the lack of cooperation

exhibited in these matters, striking the motions for partial summary judgment is sound and, ultimately, most efficient. Defendant's Motions for Partial Summary Judgment [43], [46], and [49] are stricken, with leave to renew upon completion of discovery.

However, plaintiffs' requests regarding depositions are denied at this time, with leave to renew. Similarly, plaintiffs' request for an award of fees and costs is denied, with leave to renew, pending the progress counsel achieve in exchanging and resolving discovery.

5. Defendant's Motion for Extensions [238]

Defendant seeks new deadlines for completing discovery and lodging a pretrial order. Plaintiffs object. The court is compelled to grant this motion. A final life schedule is presented below.

6. Defendant's Motion to Refer this Matter to a Special Master [242]

Counsel for defendant cite the numerous disagreements arising during the attempts to acquire discovery as grounds for referring discovery matters in this action to a Special Master. Counsel also refer to the possibility that the conduct of parties may demonstrate that the parties are unable to proceed with discovery, and therefore may establish the propriety of appointing a Special Master.

This motion is denied. Although the court is alerted to the extent to which the conduct of counsel may be contributing to the stalemate in proceeding with discovery in this matter, that conduct presents insufficient grounds to warrant the appointment of a Special Master to resolve counsel's disputes. Many disputes have been perpetuated by defendant after defendant received unfavorable rulings in certain discovery matters. Appointing a Special Master to "resolve" matters that have been ruled upon would be unfair to the parties, costly, and inefficient. The

most efficient approach is to scrutinize counsel's conduct, evaluate the necessity of sanctions where appropriate and impose them, and establish a final schedule in this matter.

7. Defendant's Motion for a Protective Order [245]

Defendant seeks a protective order to reduce the alleged harassment of the reinsurers by plaintiffs until this court rules upon defendant's motion for reconsideration. In light of this court's denial of the motion for reconsideration, this motion is denied as moot. Counsel are urged to cooperate with finalizing appropriate protective orders so that these kinds of motions remain moot.

8. Defendant's Motion to Compel Depositions [251]

Defendant's motion to compel depositions is denied. Plaintiffs' assertions that defendant's "conduct in the days and hours leading up to the fact discovery cut off was designed to create the impression that [defendant] desired deposition discovery, which the record plainly reflects is not the case," appear to be an accurate summary. Pls' Opp. To Mo. To Compel at 5. Counsel are required to cooperate, and conduct themselves professionally for the remainder of this litigation.

9. Defendant's Motion to Stay Discovery Deadlines [254]

Defendant's motion to stay discovery deadlines pending resolution of pending discovery motions is well-taken. Unavoidable delays in the resolution of those matters have necessitated re-establishing the following final schedule for the discovery in this litigation.

As addressed above, counsel are ordered to confer in hopes of crafting a joint proposed protective order. The joint proposal, or the parties' individual proposals, must be filed by February 26, 2010.

The court notes with approval the resolution achieved by counsel regarding plaintiffs' Motion to Compel Three Categories of Documents [257]. Pursuant to the parties' stipulation regarding that motion, defendant will produce, in part, copies of all defense bills defendant paid relating to the underlying actions, a listing of all defense bills defendant paid, a log of redactions, and documents referenced in defendant's "Claims Manuals" by February 15, 2010. Plaintiffs will advise defendant if counsel are satisfied with this production by March 5, 2010. Counsel will present a status report regarding this discovery to the court on or before March 17, 2010.

In accordance with these efforts, this court extends the deadline for the remainder of discovery until May 14, 2010. Counsel shall include in their status report due on or before March 17, 2010 a summary of all other discovery efforts. Dispositive motions shall be filed thirty days after close of discovery. The pretrial order lodging date will be set by the court after dispositive motions are resolved.

CONCLUSION

Defendant's Motion for Reconsideration and Clarification [175] is denied in part and granted in part for the limited purpose of providing the requested clarification.

The Motions for Protective Orders from plaintiffs and from WellPoint [181, 182] are denied. Counsel are ordered to confer again for the purpose of agreeing upon a final appropriate protective order. The proposal or proposals must be filed by February 26, 2010.

Plaintiffs' Motion to Compel Information Relating to Reserves [192] is granted as follows: defendant is ordered to produce all documents relating to reserves established for the underlying actions. This production shall be complete by March 12, 2010.

Defendant's Motion to Compel Production[196] is denied.

Plaintiffs' Motion to Compel and to Strike Defendant's Partial Summary Judgment Motions [230] is granted in part. Defendant's Motions for Partial Summary Judgment [43], [46], and [49] are stricken, with leave to renew upon completion of discovery.

Defendant's Motion for Extensions [238] is granted. A final life schedule is presented herein.

Defendant's Motion to Refer this Matter to a Special Master [242] is denied.

Defendant's Motion for a Protective Order [245] is denied.

Defendant's Motion to Compel Depositions [251] is denied.

Defendant's Motion to Stay Discovery Deadlines [254] is granted in part. A final life schedule is presented herein.

IT IS SO ORDERED.

Dated this 4 day of February, 2010.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge