

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

CHRISTINA MILLER,

Plaintiff,

v.

CIVIL ACTION NO. 2:03-2325

LIBERTY MUTUAL FIRE INSURANCE
COMPANY, et al.,

Defendants.

MEMORANDUM ORDER

Pending before the court is Plaintiff's Motion to Compel More Complete Responses to Interrogatories and Requests for Production of Documents (docket sheet document # 18), filed March 24, 2004. Defendant Liberty Mutual has responded in opposition (# 19). It appears that two requests for production of documents remain at issue: numbers 6 and 12. Defendant Liberty Mutual has agreed to produce the insurance information requested in request number 1; thus there is no controversy as to that request. The parties conferred in an effort to resolve their dispute, with some success.

Plaintiff's complaint alleges that Defendants engaged in unfair trade practices in connection with the adjustment of her claim against Defendants' insured, National Tire and Battery/Sears. The underlying claim alleged that Plaintiff's automobile tire was improperly rotated and mounted, resulting in an accident.

Request number 6 asks for production of

All written complaints, whether filed in a court of law, a state administrative office or to any agent, servant, employee or officer of Liberty Mutual, which in any way question the manner of settlement, failure to investigate a claim, allegations of unfair claim practices or violation of the covenant of good faith and fair dealing in the State of West Virginia from 1994 to the present.

(Motion to Compel, Discovery requests.)

Defendant Liberty Mutual objected, asserting that request 6 seeks production of documents in the public domain, is overly broad and unduly burdensome, and requests information from corporate entities other than the named defendant. (Motion to Compel, Discovery responses, at 16.) Liberty Mutual agreed "to provide a log of cases alleging certain bad faith claims for the National Auto Market for a limited period of time." (Id.) In subsequent correspondence dated March 15, 2004, it appears that the parties agreed that Liberty Mutual would provide "a copy of all bad faith complaints that were filed in West Virginia between 1998 and 2003 involving National Market claims." (Id., Letter to Jason Stevens, page 2; Response, # 19, at 3, 5.) Counsel for Plaintiff modified request number 6 to read: "all bad faith complaints filed against Liberty Mutual Fire Insurance Company . . . in the State of West Virginia for the period 1998 through 2003." (Motion to Compel, Letter to Jason Stevens dated March 15, 2004, at 2.)

Thus the dispute between the parties is whether Liberty Mutual should be required to produce West Virginia bad faith complaints for all of its lines of insurance or just for National Market

claims. Liberty Mutual explains that National Tire and Battery/Sears is a part of the defendant's "National Market Claims" portfolio, as opposed to its regular personal automobile portfolio or its commercial liability portfolio. (Id., at 3, n.2.) Liberty Mutual's assertion that "Plaintiff has moved to compel copies of *all civil complaints* filed by any Plaintiff *nationwide* for the time period of 1994 to present, (Response, # 19, at 3), is simply not true; Plaintiff's Motion to Compel is clear that she seeks "all information relating to previous bad faith complaints against Liberty Mutual in the State of West Virginia for the five years preceding the date of the plaintiff's settlement." (Motion to Compel, at 3.)

Plaintiff asserts that she needs the documents based on Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E.2d 252, 260 (W. Va. 1981), which held that "more than a single isolated violation of West Virginia Code § 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of a 'general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action." (Motion, # 18, at 4.) Secondly, she argues that the information "may be relative to a jury's punitive damages." (Id., at 5.)

Defendant Liberty Mutual contends that the requested documents are not relevant to Plaintiff's claim, that mere complaints do not constitute *violations* of the statute, and that court actions are

equally available to Plaintiff on the public record.

Rule 26 of the Federal Rules of Civil Procedure allows for discovery of material which is relevant to the "*claim or defense* of any party." Effective December 1, 2000, absent a showing of good cause, relevancy is no longer defined by the "*subject matter*" of the litigation. Vica Coal Co., Inc. v. Crosby, 212 F.R.D. 498, 504 (S.D. W. Va. 2003).

In State Farm Mut. Automobile Ins. Co. v. Stephens, 425 S.E.2d 577 (W. Va. 1992), the Supreme Court of Appeals of West Virginia addressed the relevancy of insurance information requested in a bad faith action, and the appropriate analysis of an objection based on burdensomeness. The Stephens case was decided in the context of West Virginia Rule of Civil Procedure Rule 26, which defines relevancy in terms of "*subject matter*," and not a party's "*claim or defense*." In Syllabus Point 4, the Court stated that "[t]he question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requested bears on the issues to be tried."

The claim pursued by Plaintiff is her assertion that Defendants engaged in unfair trade practices in adjusting her claim against the insured, National Tire and Battery/Sears. She has demonstrated that she needs the information in order to prove that "business practice." Liberty Mutual has not argued that the adjustment of non-National Market claims in West Virginia is

different from the adjustment of National Market claims; it has not asserted that the adjustment of "National Market" claims is performed by different people according to different policies and procedures than the adjustment of non-National Market claims. The court finds that Plaintiff's request number six seeks production of information which is relevant to her claim.

Having established relevancy, the next inquiry is whether the production of the requested documents will be burdensome. Liberty Mutual has made no showing that it will be burdensome to provide the information. Accordingly, it is hereby **ORDERED** that Plaintiff's Motion to Compel as to request for production number six as amended is granted.

Request number 12 seeks:

The complete file of complaints against Liberty Mutual required to be kept pursuant to *W. Va. Code* § 33-11-4(10) for the time period required by *W. Va. Code* § 33-2-9 and any such information or parts thereof regarding complaints prior to said time period contemplated by said *W. Va. Code* § 33-2-9.

(Motion to Compel, Discovery requests.) Defendant Liberty Mutual initially objected with boilerplate language. (Motion to Compel, responses, at 19.) Subsequently, it appears that Liberty Mutual agreed to provide "a list of all National Market Claims complaints for the time period between January 1, 1994 and January 1, 2004," but would not provide a copy of, or an opportunity to inspect, the files. (Motion to Compel, Letter to Jason Stevens dated March 15, 2004, at page 2.) In its Response to the Motion to Compel, Liberty

Mutual agreed "to provide a log of National Market auto consumer complaints in West Virginia from January 1, 1995 to December 31, 2003." (Response, # 19, at 6.)

Plaintiff asserts that the requested information is needed to investigate Liberty Mutual's "general business practices" and to determine whether there is evidence of concealment of bad faith claims (which would be relevant for punitive damages). (Motion, at 7.)

Defendant Liberty Mutual argues that W. Va. Code § 33-11-4(10) was not intended to be a discovery tool, that the information is not public, and that the data and information are expressly excepted from discovery by W. Va. Code § 33-2-9(1). (Response, at 6-9.)

The West Virginia Unfair Trade Practices Act requires insurance companies "to maintain a complete record of all the complaints which it has received since the date of its last examination." W. Va. Code § 33-11-4(10).

This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.

(Id.) Examinations are conducted by the Insurance Commissioner at least once every five years. W. Va. Code §§ 33-2-9(c) and (d). During the course of an examination, the Commissioner's examiners

may require the production of information and documents. The material produced to the examiners by the insurance company is given confidential treatment.

(4) All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination, analysis or review made under this section must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person, except to the extent provided in subdivision (5), subsection (i) of this section [retained experts]. Access may also be granted in accordance with section nineteen [§ 33-2-19] of this article. The parties must agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this section unless the prior written consent of the company to which it pertains has been obtained.

W. Va. Code § 33-2-9(1)(4). Section 33-2-19 states as follows:

In order to assist the commissioner in the regulation of insurers in this state, it is the duty of the commissioner to maintain, as confidential, and to take all reasonable steps to oppose any effort to secure disclosure of, any documents or information received from the national association of insurance commissioners, federal banking agencies or insurance departments of other states which is confidential in such other jurisdictions. It is within the power of the commissioner to share information, including otherwise confidential information, with the national association of insurance commissioners, the board of governors of the federal reserve system or other appropriate federal banking agency or insurance departments of other states; Provided, That such other jurisdictions agree to maintain the same level of confidentiality as is available under this statute and to take all reasonable steps to oppose any effort to secure disclosure of the information.

W. Va. Code § 33-2-19.

Upon careful reading of the statutory provisions on which Liberty Mutual relies, the court finds that Defendants' arguments

are not persuasive. West Virginia Code Sections 33-2-9 and 33-2-19 require the Insurance Commissioner to maintain the confidentiality of information submitted in connection with an examination, but those sections do not extend a blanket protection of confidentiality to insurance company records. The documents are simply records of the insurance company; a party may seek to obtain them from the insurance company, but not from the Insurance Commissioner. The court finds that the data and information maintained by insurance companies for possible submission to the Insurance Commissioner for use in examinations are not expressly excepted from discovery by W. Va. Code § 33-2-9(1). Moreover, the fact that the West Virginia Unfair Trade Practices Act requires insurance companies to maintain a record of complaints does not mean that the record of complaints is therefore confidential. Plaintiff has merely requested a category of records which is required to be maintained by Liberty Mutual as one part of doing business in West Virginia.

The court finds that the record of complaints required by W. Va. Code § 33-11-4(10) is relevant to Plaintiff's claim. See Stephens, 425 S.E.2d at 583. It is hereby **ORDERED** that Plaintiff's Motion to Compel is granted with respect to request for production number 12, as amended. Plaintiff did not request that she be given an opportunity to inspect and copy the underlying files; thus the court will not address that issue.

The Clerk is requested to mail a copy of this Memorandum Order to all counsel of record and post this published opinion at <http://www.wvsc.uscourts.gov>.

ENTER: April 27, 2004

Mary E. Stanley
United States Magistrate Judge

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