

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:

Defendant has advanced a Motion For a Protective Order Concerning Subpoenas to Defendant's Reinsurers [142]. Third party reinsurers Munich Reinsurance America, Inc., (Munich) [157] and Swiss Reinsurance America Corporation (Swiss) [163], as well as Munich's counsel Rubin Fiorella & Friedman [160] also seek similar protections, and these motions are also resolved by this ruling upon defendant's motion.

STANDARDS

1 - ORDER

"Federal Rule of Civil Procedure 26(c) states that when a party or other person from whom discovery is sought makes a motion asserting good cause for a protective order, 'the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' based on any of several listed reasons." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

The party seeking to limit that access "bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz*, 331 F.3d. at 1130. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Fischer v. City of Portland*, 2003 WL 23537981, at *2 (D. Or. August 22, 2003) (internal quotations omitted).

The court may issue protective orders that protect classes of documents upon a threshold showing of appropriate circumstances warranting such umbrella protection. *Id.* Any such order limiting access for good cause requires that the court's determination "identify and discuss the factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002).

ANALYSIS

Plaintiffs in this action are five corporations with headquarters in four different states and are hereinafter referred to as "Regence." Regence alleges 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. This court concludes that Regence's summary of the major issues in this dispute is accurate. These issues include defendant's "conduct and representations in selling the RICO coverage to Regence, [defendant's] conduct in denying

coverage, and [defendant's] contradictory positions about coverage for the Underlying Actions." Pl.'s Opp. at 2.

Defendant seeks by its motion to protect documents relating to positions it took with its reinsurers in the ordinary course of business (and arbitrations) for purposes of ensuring coverage from the reinsurers for Regence's claims. Specifically, pursuant to the prosecution of these claims, Regence seeks discovery that includes:

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.

Pl.'s Opp. at 4.

It is significant to note that "Regence is not seeking reinsurance information that involves claims of other policyholders or [defendant's] privileged material from the arbitrations that was not shared with the arbitrators or the reinsurers." *Id.*

Such discovery, limited in scope as described by Regence, is undoubtedly relevant or likely to lead to admissible evidence regarding Regence's claims for breach of contract or bad faith on the part of defendant. For example, the discovery might lead to evidence that could include admissions, be used for impeachment purposes on the question of whether defendant

denied the existence of coverage, or pertain to Regence's fraud claims, motives that might suggest defendant acted in bad faith, and flaws in defendant's asserted defenses.

The question of whether the discovery being sought may fall within the province of the attorney-client privilege or the work product privilege might be closer, but defendant (and the reinsurer parties) failed to show that specific prejudice or harm will result if no protective order is granted. While the attorney-client privilege and the work product privilege provide significant limitations on discovery, such privileges "obscure the search for the truth" and "are both narrowly construed by courts to restrict their impact upon the discovery process." *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 135 (N.D. Ill. 1993) (*Bull Data*) (citation omitted) (reinsurer documents not privileged); *see also Front Royal Ins. Co. v. Gold Players, Inc.*, 187 F.R.D. 252, 257 (W.D. Va. 1999) (the work-product doctrine operates in narrow confines: the anticipation of future litigation must have been the primary motivation which led to the creation of the documents in order to qualify for the privilege; discovery regarding insurer-reinsurer communications not privileged).

Moreover, this court is persuaded by a recent decision that concluded 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. *AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052, 2008 WL 5062030, at *7 (S.D.N.Y. November 25, 2008); *see also Bull Data*, 152 F.R.D. at 139 (material that is otherwise privileged is discoverable if it has been disclosed to a third party).

The relevant parties' interests here were not and are not aligned. Rather, defendant engaged in two contested arbitrations with the reinsurers. Not only are otherwise-applicable

privileges construed as waived, but defendant's contention that the court should invoke the common interest doctrine is rejected. This doctrine permits counsel for clients facing a common litigation opponent to exchange privileged documents and information, including attorney work product, in order to adequately prepare a defense without waiving any privilege. *Id.* (citation omitted). Because the parties' interests were not and are not aligned, the court rejects that the common interest doctrine applies in this action.

CONCLUSION

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. There has been no threshold showing of appropriate circumstances warranting such protection. Accordingly, defendant's Motion For a Protective Order Concerning Subpoenas to Defendant's Reinsurers [142], as well as related motions from third party reinsurers Munich [157], Swiss [163], and Munich's counsel Rubin Fiorella & Friedman [160] are DENIED. The parties shall cooperate in good faith to fulfill plaintiffs' outstanding discovery requests. Any future dispute will be resolved without oral argument, and an award of fees and costs will be considered.

IT IS SO ORDERED.

Dated this 1 day of May, 2009.

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