

Judge Finds Unwarranted Deceptive Discovery Practices

PHILADELPHIA - An insurer's pro hac vice counsel was removed from General Refractories Co.'s (GRC) bad faith action April 20 by a Philadelphia judge who also ordered the carrier to pay GRC and the City of Philadelphia for time and costs due to its conduct during discovery (General Refractories Co., et al. v. Fireman's Fund Insurance Co. No. 1499, Pa. Common Pleas, Phila. Co.).

(Memorandum Opinion available. Document #03-000516-106. 13 pages.)

GRC, a defendant in thousands of asbestos exposure bodily injury suits, filed this action against Fireman's Fund Insurance Co. for breach of contract, breach of fiduciary duty and bad faith.

GRC moved for sanctions against Fireman's Fund, asserting that the insurer's central representative (Mr. West) lied under oath at a deposition in stating that certain documents did not exist. GRC maintained that Fireman's Fund pro hac vice counsel knew the testimony was perjurious, did not correct the testimony and actively concealed the documents. The existence of the notes was acknowledged after Fireman's Fund counsel used the hidden documents during a subsequent deposition of GRC's principal representative.

"Initially presented along with a hundred other motions on other cases in Discovery Court, this Court heard oral argument over a four day period, reviewed voluminous filings, memoranda, appendices and exhibits and has determined that the defendant's conduct in concealing the West computer records and numerous other highly significant documents was intentional, inexcusable, and warrant severe sanctions," the court held.

'Stonewalling, Deception'

Reviewing the case's discovery history, judge Mark L. Bernstein found "a clear pattern of delay, stonewalling, deception, obfuscation and pretense. Defendant intentionally withheld critical documents, ignored Court orders, permitted false testimony at depositions and misrepresented facts to opposing counsel and the Court. The defendant, through its employees, its house counsel, and its engaged litigation counsel participated in an intentional campaign to hide critical facts and documents. At every stage of discovery, reasonable and relevant requests have been met by incomplete responses, unreasonable objections, unfounded claims of privilege and intentionally incomplete 'privilege' logs. Whenever plaintiff sought Court intervention additional documents were 'found', 'voluntarily produced' and the privilege log expanded. Finally, defendant found hundreds of additional documents and submitted a box of documents entitled 'J. Richard West, Attorney File Submitted Under Seal For Review In-Camera With Privilege Log Pursuant To Court Order Dated December 23, 1999.' It is conspicuously odd in character."

The court determined that no privileged attorney-client relationship existed and rejected work product privilege arguments.

"Concerned with protecting its own funds, to the detriment of its insured, in a conscious effort to avoid this very claim of bad faith, defendant attempted to use counsel to construct a 'privilege' wall

against discovery of the true nature of their decision making. This was no client attorney relationship. Mr. West is an employee of the defendant acting not as counsel but as an adjuster with a law degree. There is no privileged relationship."

The insurer's conduct constituted waiver of all right to assert attorney-client or work product privileges as to Mr. West, according to Judge Bernstein, who added that numerous probative documents, on which no good faith claim of privilege can be asserted, are still hidden in West's files and are discoverable.

While denying the requested sanction of judgment for GRC, the court ordered removal of the insurer's pro hac vice counsel, ordered that Fireman's Fund pay GRC \$126,897.81 for time and costs expended and the same amount to the City of Philadelphia for "unwarranted, obstreperous and deceptive conduct in discovery."

GRC is represented by John N. Ellison and Timothy P. Law of Anderson Kill & Olick of Philadelphia. 0