

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2010-091813  
CV 2011-055131

05/30/2012

JUDGE PRO TEM COLLEEN L. FRENCH

CLERK OF THE COURT  
J. Eaton  
Deputy

VINCENT QUIROZ, et al.

STEVEN C DAWSON

v.

ARCH INSURANCE GROUP INC, et al.

JEREMY E BEAL  
CHARLES M CALLAHAN  
THOMAS L HUDSON  
JOHN W SHAMBLIN  
DOUGLAS L CHRISTIAN  
KATHLEEN O'MEARA  
JAMES J BELANGER  
DANIEL G DOWD  
BRIAN E CIENIAWSKI

UNDER ADVISEMENT RULING

This matter was heard by this Court May 25, 2012.

The Court has read and considered the following:

- Plaintiffs' Motion to Consolidate This Action With CV2011-055131, Arch Insurance Company v. Jones, Skelton & Hochuli, P.L.C., et al;
- Arch Insurance Company's Response to Plaintiffs' Motion to Consolidate This Action with CV2011-055131, Arch Insurance Co. v. Jones, Skelton & Hochuli, P.L.C., et al;

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- Defendant Jones, Skelton & Hochuli's Response to Plaintiffs' Motion to Consolidate;
- Plaintiff Arch Insurance Company's Response to Plaintiffs Quiroz's Motion to Consolidate;
- Plaintiffs' Joint Reply to Three Responses to Plaintiffs' Motion to Consolidate;
- Plaintiffs' First Motion to Compel Defendant Arch Insurance Company;
- Arch Insurance Company's Response to Plaintiffs' First Motion to Compel;
- Reply to Arch Insurance Company's Response to Plaintiffs' First Motion to Compel;
- Arch Insurance Company's Sur-Reply to Plaintiffs' Reply in Support of its Motion to Compel; and
- Plaintiffs' Motion to Strike Arch Insurance Company's Sur-Reply to Plaintiffs' Reply in Support of its Motion to Compel.

The Court has also considered all relevant statutes, procedural rules and case law, as well as the arguments of counsel.

**I. Plaintiffs' Motion to Consolidate**

The Court finds that consolidation of CV2010-091813 (the "Bad Faith" case) with CV2011-055131 (the "Legal Malpractice" case) would be inappropriate. First, the Court finds that, contrary to Plaintiffs' claim, consolidation is not mandated by A.R.S. § 12-2506. Second, the Court finds that consolidation is not warranted under Rule 42(a) ARCP. Plaintiffs have no interest in the outcome in the Legal Malpractice case, therefore they have no legitimate reason to seek consolidation, except as a matter of strategy. Plaintiffs cite "practical concerns" warranting consolidation. However, the Court finds, as a practical matter, that presentation of legal malpractice evidence against Defendant Jones, Skelton & Hochuli to the jurors, who must then also decide tort claims and other claims alleged against Jones, Skelton & Hochuli in the Bad Faith case, would be unduly prejudicial to Jones, Skelton & Hochuli. Additionally, the Court finds that consolidation of the bad faith claims against Jones, Skelton & Hochuli with the legal malpractice claims against it would present an unduly confusing evidentiary matrix for the jurors to decipher. For these reasons,

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**IT IS ORDERED** denying Plaintiffs' Motion to Consolidate This Action With CV2011-055131, Arch Insurance Company v. Jones, Skelton & Hochuli, P.L.C., et al.

**II. Plaintiffs' Motion to Compel**

There appear to be three unresolved issues relative to Plaintiffs' Motion to Compel. Specifically, still at issue are Plaintiffs' requests for: (1) the personnel files of individuals involved in handling the claim; (2) information regarding the reserves set on Plaintiffs' claim; and (3) e-mails between current counsel for Arch, in-house counsel for Arch, other counsel for Arch, and representatives of Arch generated after Plaintiffs filed their Complaint.

According to Rule 26(b)(1)(A), ARCP, discovery can be sought regarding any matter that is not privileged, which is relevant to the pending action. This is the rule, regardless of whether the information sought will be admissible at trial so long as the information sought appears to be "reasonably calculated to lead to the discovery of admissible evidence." The scope of discovery, as defined in Rule 26(b), is broadly construed "to facilitate identifying the issues, promote justice, provide for a more efficient and speedy disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a guessing game." *U-Totem Store v. Walker*, 142 Ariz. 549, 552, 691 P.2d 315, 314 (App. 1984).

*A. Personnel Files*

Plaintiff seeks the personnel files of Arch employees involved in handling Plaintiffs' claim. The Court finds that information relating to monetary incentives and other incentives relating to claim decisions contained in the personnel files of individuals who handled Plaintiffs' claim could be relevant to Plaintiffs' bad faith claim. The Court finds this information to be relevant despite the fact that Plaintiffs have not specifically alleged that the employees possessed financial incentives relating to Plaintiffs' claim. Therefore,

**IT IS ORDERED** granting Plaintiffs' Motion to Compel production of the personnel files as follows: Defendant is ordered to disclose information in the personnel files of the employee(s) who had the responsibility of approving or denying Plaintiffs' claim, relating to compensation/monetary incentives/other incentives to that employee to grant or deny claims.

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*B. Reserve Information*

Plaintiffs seek information from Arch regarding the reserves set on Plaintiffs' claim. Defendant Arch contends that this information is irrelevant, and that the documents at issue contain confidential and proprietary information.

A particular reserve amount does not necessarily reflect the insurer's valuation of a particular claim. *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1189 (Colo. 2002) While reserve information may therefore have limited relevance to the claims at issue, the Court finds that it still could have some relevance to Plaintiffs' bad faith claim and is subject to disclosure. This is true despite Defendant's claim that the documents at issue contain confidential/proprietary information.

An insurance company owes a duty to its insured to adjust its claims in good faith. *See, Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, ¶¶ 8, 9, 256 P.3d 635 ¶¶ 8, 9 (App. 2011). The scope of discovery of insurance information is broader in cases involving claims between an insured and an insurer than in a personal injury case brought by a third party. *Silva*, 47 P.3d at 1192. Courts have been more likely to find reserves discoverable in claims between insureds and insurers, such as in bad faith claims, than in 3<sup>rd</sup> party claims. *Id.* In bad faith claims, reserve information can be relevant and reasonably calculated to lead to admissible evidence regarding whether the insurer adjusted the claim in good faith or made a prompt investigation, assessment or settlement of a claim. *Id.*, at 1193, *citing Lipton v. Superior Court*, 48 Cal. App. 4<sup>th</sup> 1599, 1614 (1996).

The Court finds that the reserve information pertaining to Plaintiffs' underlying uninsured motorist claim, contained in documents that were created prior to or contemporaneous with the denial of Plaintiffs' uninsured motorist claim, are discoverable and must be produced.

Defendant Arch's claim that these documents contain confidential or proprietary information does not automatically shield them from discovery. Defendant Arch's claims in this regard are too general to warrant protection; Defendant Arch has the burden of demonstrating good cause for confidentiality under Rule 26(c)(2), ARCP, and it has not met this burden. The Court declines Defendant Arch's invitation to undertake its own *in camera* inspection of these documents, in order to discern what Defendant Arch deems should be kept confidential. The manner in which the disclosed information can be used/disseminated, however, is a matter of

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continuing concern for the Court, and if Defendant Arch desires to limit the dissemination/use of this information, it may seek a protective order.

**IT IS ORDERED** granting Plaintiffs' Motion to Compel production of the reserve information pertaining to Plaintiffs' underlying uninsured motorist claim.

*III. Emails*

Plaintiffs seek e-mails between current counsel for Arch, in-house counsel for Arch, other counsel for Arch, and representatives of Arch generated after Plaintiffs filed their Complaint. The Court finds that these documents are subject to the attorney/client privilege and therefore not discoverable. Defendant Arch has not waived the attorney/client privilege with regard to these communications. Therefore,

**IT IS ORDERED** denying Plaintiffs' Motion to Compel production of the e-mails between current counsel for Arch, in-house counsel for Arch, other counsel for Arch, and representatives of Arch generated after Plaintiffs filed their Complaint.

**III. Plaintiffs' Motion to Strike**

**IT IS ORDERED** granting Plaintiffs' Motion to Strike Arch Insurance Company's Sur-Reply to Plaintiffs' Reply in Support of its Motion to Compel.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.