

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Trenton B. Ingram,

Debtor.

Ralph McCullough, as Trustee for the  
Estate of Trenton B. Ingram,

Plaintiff,

v.

Allstate Insurance Company,

Defendant.

FILED  
1999 DEC -2 AM 11:34  
U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA  
C/A No. 98-05909-W  
Adv. Pro. No. 98-80251-W

JUDGMENT

Chapter 7

ENTERED  
DEC 02 1999  
V. L. D.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached order of the Court, the Defendant will comply with the September 13, 1999 Order within ten (10) days following the entry of this Order by producing the documents and affidavit as required herein, and by paying to the Trustee for the benefit of the estate the sum of One Thousand and no/100 (\$1000.00) Dollars as reasonable expenses incurred in the Second Motion to Compel.

Columbia, South Carolina  
December 2, 1999

  
UNITED STATES BANKRUPTCY JUDGE

99-241  
59

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

**DEC 2 1999**

*Haigler, Dowe, Bradley, Moore*  
**DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE** *jmgt indiv*

**VANNA L. DANIEL**

Deputy Clerk

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ORDER

Chapter 7

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THIS MATTER comes before the Court upon Plaintiff's Second Motion to Compel Discovery filed on October 21, 1999 pursuant to Rule 37(a) of the Federal Rules of Civil Procedure. Based upon the Motion, the record, and the representations of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Plaintiff's Interrogatories and Request for Production were served upon Defendant by mail on June 1, 1999.
2. Defendant failed to make a timely response or objection to this discovery as required by the Federal Rules of Civil Procedure, Rule 33 and 34.
3. On August 18, 1999, Plaintiff filed a Motion to Compel Discovery.
4. Defendant filed no objection to the Motion to Compel Discovery as required by the Local Rules of this Court.
5. Following a hearing held on September 2, 1999 at which Defendant's counsel appeared and stated that he had or would meet the discovery requests; an Order was entered on

*JW-106-*

September 13, 1999 which held that the discovery sought by Plaintiff in Plaintiff's Interrogatories and Request for Production was to be provided by Defendant to Plaintiff. Plaintiff did not request attorneys fees and costs allowable pursuant to Federal Rules of Civil Procedure 37(a) for Defendant's first failure to respond to discovery. At a continued pretrial conference on October 12, 1999, Plaintiff again raised the fact that Defendant had not fully complied with discovery or the Court's September 13, 1999 Order. Again, Defendant's counsel assured the Court that the discovery requests would be met immediately.

6. On October 21, 1999, Plaintiff filed a Second Motion to Compel Discovery which indicated that Defendant had failed to or refused to respond or fully respond to certain discovery requests as required by this Court's Order of September 13, 1999 and requested reasonable expenses pursuant to Federal Rules of Civil Procedure 37(a).
7. Prior to the hearing on the Second Motion to Compel which had been noticed on October 26, 1999, more than 10 days before the hearing, no motion for continuance on behalf of the Defendant was filed in accordance with Local Rule 7016-1(b). At the hearing on the Second Motion to Compel on November 9, 1999, Defendant was represented by Kenneth Ebener, an attorney with the law firm representing Defendant. Mr. Ebener, an attorney experienced in this Court, did not request a continuance of the hearing nor did he appear incompetent to handle the matter before the Court. While Mr. Ebener indicated S. Jahue Moore was participating in a matter in U.S. District Court, Mr. Moore's participation did not appear necessary. Furthermore, no explanation was offered as to the absence of J. Edward Bradley, another attorney with the same law firm who had filed a Defendant's response to the Second Motion to Compel on November 5, 1999.
8. Plaintiff made a good faith effort to secure requested discovery prior to bringing this Second Motion to Compel and that Defendant's failure to timely respond or object is due



either to counsel's lack of diligence or a flaunting of the Federal Rules.

### CONCLUSIONS OF LAW

Defendant made no timely objection or motion to limit the scope of Plaintiff's requested discovery as required by the Federal Rules of Civil Procedure. These Rules are designed for an orderly and fair discovery process. After Defendant's counsel repeated assurances to the Court that Defendant had or would meet the requirements of the discovery, this Court's Order entered September 13, 1999 required Defendant to produce the documents covered in Plaintiff's Request to Produce and to respond to Plaintiff's Interrogatories. Defendant did not timely make any motion for relief nor take an appeal of said Order. Any objection to the discovery requested by Plaintiff was waived by Defendant. The Defendant is represented by a law firm with several attorneys, three of which have appeared previously in this proceeding. It is counsel's responsibility to coordinate their appearance in various courts and to advise this Court in advance and according to the Rules of any potential prejudice regarding the scheduling of hearings in the proceeding. In this matter, counsel had more than sufficient notice of this Court's hearing, as well as any matters in the U.S. District Court, to coordinate and prepare other members of the firm to appear and competently represent Defendant.

In this Court's view, Defendant's conduct in response to discovery indicates a stonewalling of legitimate discovery requests and a blatant contempt for the Order of this Court and its goal to proceed to the trial and conclusion of this proceeding. Therefore, Defendant is further **ORDERED** to provide to Plaintiff complete responses to Plaintiff's discovery as previously Ordered within ten days.

Based upon the particulars of Plaintiff's Second Motion to Compel and upon Defendant's Response to Plaintiff's Motion to Compel Discovery, as well as the representations made at the hearing by counsel for the parties and the totality of circumstances, it appears Plaintiff's



discovery requests are relevant for discovery purposes and that any other objection Defendant now asserts has been previously waived.

As to the specific items requested by Plaintiff, the Court finds that the contact notes to which Defendant now objects to providing are relevant and discoverable by Plaintiff in this action. As Defendant has provided certain Adjuster contact notes for a period of time in response to Plaintiff's Request for Production, it cannot withhold other contact notes, based upon its own determination of relevancy. "There is no middle ground entitling [the responding party] to produce some documents and withhold others, depending upon [the responding party's] ex parte determination of relevancy." Smith v. Logansport Community School Corp., 139 F.R.D. 637, 648 (D.C. Ind.1991). Furthermore, the supervisor's notes which Defendant objects to providing are appropriate subjects of discovery as relevant themselves, or as matters which may lead to relevant information.

Further, Defendant has failed to timely demonstrate that the memorandum of Henry Sally or the letter from Allstate in house counsel to Henry Salley dated May 28, 1998 are protected by the attorney-client privilege. FRCP 34 requires that a party which objects to producing a document based upon a claim of privilege "has the burden of establishing its claim of privilege or protection; a baldfaced assertion is insufficient." Peat, Marwick, Mitchell & Co., v. West, 748 F.2d 540, 541 (10th Cir. 1984). "The party opposing disclosure had a duty to seek a protective order and has the burden of showing good cause through a factual demonstration if necessary." Mason C. Day Excavating, Inc., v. Lumbermens Mut. Cas. Co., 143 F.R.D. 601, at 609 (M.D.N.C. 1992) (citing Brittain v. Stroh Brewery Co., 136 F.R.D. 408 (M.D. N.C. 1991)). Defendant did not timely seek such a protective order nor has it presented proof establishing its claim of privilege for this memorandum.

In regards to Plaintiff's Interrogatory # 10, Plaintiff's Motion to Compel indicates that Defendant failed to respond to the following Interrogatory:

A handwritten signature in black ink, appearing to be "JW4", is located at the bottom center of the page.

Interrogatory 10. - Give the following information for any suits against Defendant brought in the South Carolina State Courts or the Federal Courts located within South Carolina from January 1993 to the present, which relate to bad faith, breach of contract, unfair trade practices, improper or negligent claims adjustment practices:

- a. The name, address and telephone number of the person or entity bringing the suit;
- b. The nature of the suit;
- c. The name of the court in which such matter has been brought, and the court case file number;
- d. State whether the claim or suit is currently pending or has been concluded.

Defendant failed to respond to this interrogatory. At the September 2, 1999 hearing, Defense counsel, S. Jahue Moore, represented to this Court that he was not certain that Defendant maintained no records of the information sought and that it may be unduly burdensome for Defendant to provide the requested information. At the November 9, 1999 hearing, Defense counsel, Kenneth W. Ebener, reiterated the representations previous made by Mr. Moore.

However, at the request of Plaintiff and with the stated consent of Defendant's counsel on November 9, 1999, this Court orders Defendant's General Corporate Counsel, or other similar corporate officer, to submit an Affidavit to this Court and to Plaintiff's attorney within ten days following the entry of this Order addressing the following matters:

- (1) Verifying that Defendant maintains no records which would provide the information sought by Plaintiff in Interrogatory 10;
- (2) Explaining what records, if any, Defendant maintains or has access to which would provide any of the information sought by Plaintiff in Interrogatory 10; and
- (3) Explain in detail what steps Defendant would have to take to secure the information requested by Plaintiff in Interrogatory 10.

Plaintiff also requested attorneys fees and costs associated with the bringing of this Second Motion to Compel, as well as sanctions against Defendant, including the striking Defendant's Answer. Plaintiff submitted to this Court an Affidavit and itemized listing of fees



and expenses from Plaintiff's attorney, L. Dale Dove, and requested the amount of \$1,400 as expenses associated with the bringing of this Motion. Pursuant to FRCP 37(a)(4), Defendant shall, within ten days following the entry of this Order, pay to the Trustee for the benefit of the estate, the sum of One Thousand and no/100 (\$1000.00) Dollars as reasonable expenses incurred in the Second Motion to Compel. The Request to Strike the Defendant's Answer is denied at this time, but Defendant is specifically cautioned that any further violations of this Court's Orders on discovery may result in the sanction of striking Defendant's Answer.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Defendant will comply with the September 13, 1999 Order within ten (10) days following the entry of this Order by producing the documents and affidavit as required herein, and by paying to the Trustee for the benefit of the estate the sum of One Thousand and no/100 (\$1000.00) Dollars as reasonable expenses incurred in the Second Motion to Compel.

**AND IT IS SO ORDERED.**

  
United States Bankruptcy Court Judge

Columbia, South Carolina  
December 2, 1999.



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