

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **08-04215-hb**

Adversary Proceeding Number: **09-80052-hb**

ORDER

The relief set forth on the following pages, for a total of 4 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
10/01/2010**



Entered: 10/04/2010

US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

Joe Gibson's Auto World, Inc.,

Debtor(s).

Joe Gibson's Auto World, Inc.,

Plaintiff(s),

v.

Zurich American Insurance Company
Universal Underwriters Insurance Company,

Defendant(s).

C/A No. 08-04215-HB

Adv. Pro. No. 09-80052-HB

Chapter 11

AMENDMENT/CLARIFICATION

ORDER AT DOCKET #200

THIS MATTER comes before the Court pursuant to the Motion to Alter or Amend filed by Defendants, Docket # 215. In that Motion the Defendants requested that the Court reconsider, alter or amend the order appearing at Docket #200, stating that parts of it are “incomprehensible and impossible to apply in practice.” As a result of that pleading and to clear up any inconsistencies or errors, the Court makes the following amendment/clarification by replacing the text on Pages 18 and 19, beginning with the second paragraph, with the following:¹

If Mr. Gibson is represented by counsel when the deposition resumes, can he and his counsel use 7030-1(h) to privately discuss documents not provided (or otherwise identified) at least three (3) business days before the deposition that commenced on July 16?

¹

This text replaces all content between the beginning of the second paragraph on Page 18 and the heading “Are discussions pursuant to 7030-1(e) and (h) protected by the attorney client privilege?” on Page 19.

Rule 7030-1(h) states that if documents are not provided (or otherwise identified) at least three days before the deposition then the witness and witness's counsel may "have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document." SC LBR 7030-1(h). The Rule is not entirely clear as to who should receive the documents to avoid any discussion between witness and witness's counsel after the deposition begins. However, the Court need not determine the exact application of the rule on this point because Defendants did not provide or identify the documents to anyone prior to the deposition. Electing not to provide the documents, Defendants are on notice that if the witness is represented by counsel then he may discuss the documents with the witness at the deposition. The Court has been unable to locate any controlling authority from the parties' pleadings or from its own research indicating that a witness cannot employ or utilize counsel later than three days before the deposition, after the commencement of a deposition and/or before it is concluded.² Resulting disruptions may need to be addressed by the Court, and Defendants have moved for sanctions to give the Court an opportunity to address those matters. However, as Defendants elected not to provide the documents or identify them in advance of the

² Defendants' Reply Memorandum states that "[i]t has been found that where an attorney can represent an agent of a corporation at a deposition but does not put the other party on notice that they intend to act in that capacity before the deposition that the attorney has waived the right to be witness's counsel at the deposition." (Docket # 182 at 5 (citing *Olson v. Accessory Controls & Equipment Corp.*, 1994 WL 51048 (Conn. Super. Ct.)). However, assuming that case is applicable authority (unreported Connecticut case), it merely mentions in dicta that a deposition witness (current or former corporate officer) who states that he is not represented by counsel cannot later benefit from a claim that he was represented by corporate counsel as a defense to failure to produce subpoenaed documents. It does not address a witness's ability to gain counsel for ongoing or future events. (See *Author's Comments*, 1 Conn. Prac., Super. Ct. Civ. Rules § 13-28(d) (2009 ed.) (discussing the significance of this case: "...an objection ... to a subpoena for documents addressed to a former employee of the corporate defendant should have been made by that employee and not the corporate defendant. However, since the former employee was unrepresented the court allowed an argument on the merits.")).

*deposition, the Court can find no applicable authority that would have deprived the witness from speaking with his counsel about the documents on July 16 if he had counsel. In addition, the Court can find no authority that would deprive Mr. Hawkins, or any attorney that may represent Mr. Gibson when the deposition resumes, from exercising the rights set forth in 7030-1(h). This local rule specifically grants a witness the right to discuss a document with witness's counsel during the deposition under certain circumstances. It appears that those circumstances, as described in this Order, will exist when this deposition resumes. Further, the Court is not persuaded on this record that the conduct described herein rises to the level of abusive deposition tactics and results in waiver or estoppel to prevent an exercise of 7030-1(h) rights, that Plaintiff has gained some unfair advantage or that any unfair prejudice to Defendants has resulted. Further, the Court does not agree with Defendants' assertion that if a witness does not request an off the record conference about a document pursuant to 7030-1(h) **before** the witness is questioned about the document that a waiver of that right must result.*

Except as specifically set forth herein, Defendants' Motion is denied and the Court reaffirms the remainder of its decision set forth in the prior Order on this matter (Docket #200) and its Order that denied Defendants' Motion for sanctions (Docket #211).

IT IS SO ORDERED.