

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Capella University, Inc.,

Court File No.: 06-CV-607 JMR/FLN

Plaintiff,

vs.

Executive Risk Specialty Insurance
Company, Arthur J. Gallagher & Co.,
and Arthur J. Gallagher Risk
Management Services, Inc.,

**ARTHUR J. GALLAGHER RISK
MANAGEMENT SERVICES, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL**

Defendants.

This lawsuit is centered on whether there is insurance coverage under a professional liability policy issued by Executive Risk Specialty Insurance Company (“Executive Risk”), for an underlying lawsuit brought against Capella University by a former student, Jeff LaMarca. Executive Risk denied all coverage for the underlying lawsuit, claiming (1) the policy terms exclude coverage; and (2) Capella made misrepresentations in its application for insurance. In raising these defenses, Executive Risk has put its underwriting processes and policy terms squarely at issue—yet has refused to produce its written underwriting guidelines (called the “Playbook”) and other policy interpretation materials, even after its underwriter testified under oath that she regularly referred to the Playbook during the underwriting process. Gallagher Risk, the broker involved in procuring the professional liability policy, now moves to compel production of the Playbook and

all other guidelines, manuals, and annotated policies that pertain to this professional liability policy.

PROCEDURAL AND FACTUAL BACKGROUND

This declaratory judgment action was initially commenced in February 2006 by Capella against their professional liability insurer, Executive Risk, after Executive Risk denied all coverage for a lawsuit brought against Capella by a former student, Jeff LaMarca. In its answer, Executive Risk claimed the LaMarca lawsuit was not covered based upon a “pending and prior” exclusion, but also affirmatively alleged that Capella “made misrepresentations of material fact in its application for coverage and that these misrepresentations void coverage for LaMarca’s claims against plaintiff under the policy.” See Exhibit A attached to Affidavit of Vraa, Defendant Executive Risk Specialty Insurance Company’s Answer to First Amended Complaint, ¶ XVIII.¹ Executive Risk claims a complaint filed by LaMarca with the U.S. Department of Education (“DOE”), which was investigated and dismissed four months before the Executive Risk policy was issued, removes coverage for the subsequent LaMarca lawsuit.

In September 2006, Capella amended its complaint to add claims against Arthur J. Gallagher Risk Management Services, Inc., the involved insurance broker, and Arthur J. Gallagher & Co. In its answer, both Gallagher entities denied the allegations against them, and Gallagher Risk brought a cross-claim against Executive Risk, seeking a declaration that the Executive Risk policy

¹ All noted Exhibits are attached to the Affidavit of Vraa.

provided coverage for the underlying LaMarca lawsuit. See Answers, Court Dockets 38 and 44.

On March 15, 2007, Gallagher Risk served interrogatories and document requests on Executive Risk, requesting the written underwriting guidelines and any policy manuals, materials, or guidelines that governed the underwriting process or interpretation of relevant policy terms. See Exhibit B, Arthur J. Gallagher Risk Management Services, Inc.'s First Request for Production of Documents to Executive Risk Specialty Insurance Company. These requests were relevant to both the alleged misrepresentation defense and the "pending or prior" exclusion. With respect to the misrepresentation claim, the requests were aimed at (1) discovering the written guidelines for issuing professional liability policies; (2) the weight, requirements, and consideration of application information; (3) the discretion of the underwriter in the process; (4) the reliance of the underwriter on the application information; and (5) whether the alleged misrepresentation was material. With respect to the policy interpretation issue, the requests were aimed at (1) Executive Risk's own internal interpretation of the policy language at issue; and (2) manuals or guidelines used by the underwriters or claims persons in evaluating coverage and exclusions.

Almost one month late, and on the eve of the deposition of the Executive Risk underwriter, Chubb served their response to Gallagher Risk's Request for Production of Documents. In their response, Executive Risk refused to produce

any information pertaining to written underwriting guidelines and policy manuals.

The relevant Requests and Responses are as follows:

REQUEST NO. 4:

A copy of the underwriting guidelines that were in effect during the quotation and issuance of the Educators Professional Liability insurance policy to Capella Education Company.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

In addition to the general objections noted above, ERSIC objects to this request on the grounds of overbreadth, vagueness, undue burdensomeness, and because this request calls for the production of confidential and proprietary documents and information.

* * *

REQUEST NO. 8:

All manuals or guidelines that relate in any way to evaluating an application for insurance coverage in effect in 2005.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

In addition to the general objections noted above, ERSIC objects to this request on the grounds of overbreadth, vagueness, undue burdensomeness, and because this request calls for the production of confidential and proprietary documents and information.

REQUEST NO. 9:

All manuals, guidelines, and/or annotations that relate to interpretation of the policy language used in the above-referenced Educators Professional Liability insurance policy to Capella Education Company.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

In addition to the general objections noted above, ERSIC objects to this request on the grounds of overbreadth, vagueness, undue burdensomeness, and because this request calls for the production of confidential and proprietary documents and information.

Exhibit C, Executive Risk Specialty Insurance Company's Responses to Arthur J. Gallagher Risk Management Services, Inc.'s First Request for Production of Documents.

At her deposition on May 1, the underwriter for Executive Risk, Kristina Stachula, testified that she regularly referred to written underwriting guidelines (called the "Playbook") when making determinations on whether to bind coverage for a particular policy or insured. See Exhibit D, Stachula deposition, p. 26-27. The 100-page Playbook contained limits and deductible guidelines, classes of business, endorsement guidelines, company-specific sections, guidelines and protocol for writing new business, including a requirement that new business required completion of an Executive Risk (i.e. Chubb) application. Exhibit D, Stachula deposition, pp. 33-36. It also contained a description of the various coverage lines, including a description of the educator's professional liability coverage. Exhibit D, Stachula deposition, pp. 35-37. After this testimony was elicited, counsel for Gallagher Risk had a meet-and-confer on the record, and Gallagher Risk counsel demanded production of the Playbook. Exhibit D, pp. 26-32. Despite its relevancy to the claimed misrepresentation issue and the application of the exclusion, counsel for Executive Risk simply stated the Playbook was "irrelevant." Exhibit D, pp. 26-33. He also admitted he had never even seen the Playbook to judge its relevancy to the issues at hand. Exhibit D, p. 29.

Stachula also testified that she did not receive the completed Executive Risk application for coverage until June 14, 2005, after the policy was issued on May 9, 2005, and therefore, she did not rely upon any information in the completed Executive Risk application, even though she stated that the written underwriting guidelines required a completed Chubb/Executive Risk application for “new business.” Exhibit D, pp. 77-80, 34-35². In response to questioning, Stachula also testified that the prior DOE complaint that was dismissed before the application was completed was not a pending or prior “claim” that would fall within the “pending or prior” exclusion. Exhibit D, pp. 101-104.

Following the Stachula deposition, new counsel for Executive Risk personally delivered a 4-5 page document which he claimed was the relevant pages of the Playbook for educator’s liability coverage. Aff. of Vraa, ¶ 2. Counsel for Gallagher Risk were permitted to inspect the document but could not retain a copy of the document. Aff. of Vraa, ¶ 2. The document contained relevant information on the coverage description, marketing information, analyzing the various potential risks, and other descriptions of the coverage. Aff. of Vraa, ¶ 2. Gallagher Risk orally requested its production (which was refused), but also demanded production of the other, more general written underwriting guidelines referenced by Stachula in her deposition. Aff. of Vraa, ¶ 2. To date, Executive Risk will not produce any of the requested documents.

² She also testified that even if the application would have referenced the prior DOE complaint filed by LaMarca which was dismissed in January 2005 (four months before issuance of the policy), she would have likely still issued the policy regardless with no increase in premium. Exhibit D, pp. 98-99. Despite this fatal admission, Executive Risk continues to assert its misrepresentation claim.

ARGUMENT

Rule 26(b) permits discovery regarding “any matter, not privileged, that is relevant to the claim or defense of any party * * *.” Fed. R. Civ. P. 26(b). Relevant information need not be admissible at trial, as long as the discovery appears to be reasonably calculated to lead to the discovery of admissible information. Fed. R. Civ. P. 26(b). Rule 26(b) is construed liberally, to permit each party to scrutinize all relevant evidence so each party will have a fair opportunity to present its case at trial. *See Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992); *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 104 (D.N.J. 1990).

A. The Playbook and Other Policy Interpretation Materials are Relevant and Discoverable

Here, Chubb has raised two defenses in its answer. First, it claims that an exclusion precludes coverage. Second, it claims that regardless whether the exclusion applies, Capella made a misrepresentation in their application that voids the coverage. The Playbook, and any other policy manuals and interpretative documents, are squarely relevant to both issues.

First, the misrepresentation defense raises a number of issues, including whether a misrepresentation was made, whether it was material, whether Executive Risk relied upon it, whether such reliance was justifiable, and whether it caused any loss. *See generally Nielsen v. Mutual Service Cas. Ins. Co.*, 243 Minn. 246, 249-50, 67 N.W.2d 457, 459-60 (1954); *Security Mut. Cas. Co. v.*

Affiliated FM Ins. Co., 471 F.2d 238, 242-45 (8th Cir. 1972) (addressing common-law elements and additional statutory elements for misrepresentation claim); Minn. Stat. § 60A.08, subd. 9 (addressing requirement of “materiality”). Here, the underwriter has testified that the Playbook addressed coverage information, loss history, guidelines on what information was needed to underwrite a particular business or policyholder, endorsement guidelines, application requirements, and a myriad of other information that is directly relevant to materiality, reliance, and causation. Exhibit D, Stachula depo, pp. 26-37. This is particularly true where the underwriter herself has admitted she did not even have the completed Executive Risk application in her possession before she underwrote the policy – and she did not rely upon such information. Exhibit D, pp. 77-80. She went further and stated that, had she known of the prior resolved DOE complaint, she would likely have underwritten the policy anyway with no increase in premium. Exhibit D, pp. 98-99. Since Executive Risk continues to trumpet its misrepresentation claim, the Playbook information is directly relevant to how Executive Risk approached its underwriting process, whether they relied upon the alleged misrepresentation, and whether the misrepresentation was material.

Second, the Playbook, as well as any other policy manuals and interpretive documents, are also relevant to the interpretation and application of the claimed “pending or prior” exclusion. The underwriter has already testified that the prior DOE complaint does not qualify as a “claim” to fall within the reach of the “pending or prior” exclusion. Exhibit D, pp. 101-104. The Playbook apparently

describes the coverages, including their purpose and reach, and there is very likely additional policy manuals and materials relevant to how Executive Risk represented and applied the coverage and exclusion applicable here. All of these documents relate to the coverage issue, have been directly requested, and should be produced.

Courts from other jurisdictions have routinely ordered the production of underwriting guidelines and policy interpretative manuals, finding them relevant to misrepresentation claims, coverage positions, or both. *Hoechst v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1099, 1107 (Del. Sup. 1991) (ordering production of underwriting guidelines as relevant to how the insurer understood and intended to apply policy language); *Lanham v. Blue Cross and Blue Shield of South Carolina*, 563 S.E.2d 331, 334 (S.C. 2002) (finding underwriting guidelines are relevant to claims of misrepresentation, and finding summary judgment inappropriate before disclosure of underwriting guidelines); *Glenfed Devel. Corp. v. Superior Ct*, 62 Cal. Rptr.2d 195, 198 (Cal. App. 1997) (claims manual and guidelines are discoverable as they generally provide guidelines for processing claims and insurer's interpretation of standard policy language); see also *Stonewall Ins. Co. v. Nat'l Gypsum Co.*, 1988 WL 96159, *3-5 (S.D.N.Y. 1988) (upholding production of underwriting guidelines and policy manuals). (Exhibit F).

In fact, a review of unpublished cases indicates that Executive Risk has prior experience in producing their underwriting manuals and policy manuals. In *Kansas Heart Hospital v. Executive Risk Indemnity*, 2007 WL 1343692 (D. Kan.

2007), in another insurance coverage dispute, Executive Risk was ordered to produce underwriting manuals, operations manuals, and related documents which explain or interpret the meaning of its insurance provisions. *Id.* at *3 (Exhibit E). Of course, the issues in this case are even broader, as Executive Risk has raised both coverage defenses **and** alleged misrepresentation claims. Its Playbook, as well as any other policy interpretive materials, are directly relevant to both claims, and have been specifically requested by Gallagher Risk, with nothing forthcoming.³

In sum, the Playbook and all other policy interpretation materials are relevant and discoverable. Gallagher Risk respectfully requests that this Court order complete disclosure of all information requested in the above-noted document requests.

B. Sanctions are Appropriate in this Case

The Playbook and other policy interpretation materials are relevant and discoverable. In good faith, Gallagher Risk has requested appropriate documents, established their relevance, and attempted to work out their production. Despite this, Executive Risk has refused their production (even before actually seeing the material), delivered a 4-5 page document for review but not copying (even though there is clearly additional general guidelines and material available beyond this), and required Gallagher Risk to bring this motion.

³ At the Stachula deposition, counsel for Gallagher Risk also requested a privilege log, which has not been forthcoming to date.

Gallagher Risk counsel has addressed this issue several times with Executive Risk counsel, with no resolution. Aff. of Vraa ¶ 9. Under these circumstances, Gallagher Risk respectfully requests that sanctions be imposed in the form of attorney fees for drafting these motion papers. Should the Court agree, Gallagher Risk will prepare an affidavit detailing the fees expended.

CONCLUSION

In conclusion, because the Playbook and other policy manuals and interpretive materials is relevant to the claims and defenses of this case, Gallagher Risk respectfully requests that this Court grant our motion to compel, and impose appropriate sanctions for the costs of bringing this motion.

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