

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Certificates of
Authority of American Family Mutual
Insurance Company, American
Standard Insurance Company of
Wisconsin, American Family Life
Insurance Company, Wisconsin
Corporation, doing business in the
State of Minnesota.

DISCOVERY ORDER

On December 17, 1996, the Respondents, American Family Insurance Companies, filed a Motion to Compel Discovery. On December 19, 1996 the Department of Commerce also filed a Motion to Compel Discovery. The motions were argued during a telephone conference on December 20, 1996.

The Respondent's were represented by Cory J. Ayling, Esq. and Kathleen M. Brennan, Esq., of the firm of McGrann, Shea, Franzen, Carnival, Straughn and Lamb, 2200 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, Minnesota 55402-2041. The staff of the Department of Commerce was represented by Michael A. Sindt, Assistant Attorney General and Gregory Gisvold, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130. Also participating in the telephone conference was Jeffrey R. Anderson, Esq. of the firm of Reinhardt and Anderson, 332 Minnesota Street, Suite E-1000, St. Paul, Minnesota 55101-1313, who represents Mary McClure and Gary Kemp.

Based upon the filings by the parties, and the oral argument during the telephone conference, and for the reasons set out in the memorandum which follows:

IT IS HEREBY ORDERED that:

1. The hearing in this matter is continued to February 18, 1997 beginning at 9:30 a.m. at the Office of Administrative Hearings and continuing on the following three days.
2. The discovery deadline is extended to January 31, 1997.
3. Each party will submit a trial brief, a final witness list, and a stipulation of facts or conclusions on or before February 11, 1997.

4. That the Department shall provide a summary of the expected testimony of witnesses Gruenes, LaVasseur and LeTourneau which shall include any expected testimony concerning their contacts with respondents.

5. Deponents Kemp and McClure shall answer questions concerning their discussions with Legislators during the 1996 legislative session.

6. The Respondents shall provide a privilege log to the department as described in Ms. Peterson's letter of November 21, 1996.

7. The Department shall be permitted to take the deposition of Harvey Pierce.

8. That the Motions of the parties are in all other respects denied.

9. That the written discovery ordered above shall be provided within ten (10) working days of the date of this Order.

Dated this _____ day of December, 1996.

GEORGE E. BECK
Administrative Law Judge

MEMORANDUM

The Respondents seek an order compelling answers to three interrogatories. Interrogatory No. 12 seeks disclosure of contacts between Department administrators and Respondents. Interrogatory No. 13 seeks a disclosure of the expected testimony of the administrators. During the telephone conference the Department agreed to provide a summary of the testimony of the three administrators in question. It also agreed to state in that summary whether or not the expected testimony would include mention of contacts with the Respondents, which was inquired about in Interrogatory No. 12. Since, as the Department points out, the Respondent should also have knowledge of these contacts, the Order in this matter should provide adequate disclosure.

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Interrogatory No. 8 asks for identification of all contacts between the Department and American Family agents or customers. The Department objects that this request is overbroad and seeks information which is not relevant. In the telephone conference the Department stated that it had no recorded statements in this regard, although it

acknowledged telephone interviews with agents and customers. It stated that it had not contacted any customers but that some had called the Department. It argued that the only documents existing were the personal notes of investigators and attorneys, which they believe is privileged. The Respondents argue that they are entitled to know what customers had been contacted, how the Commissioner has characterized this action and what information the Commissioner sought from customers.

The Department will, of course, be required to produce a witness list which will disclose any agent or customer to be called as a witness. The Respondents have failed to satisfy their burden under Minn. Rule 1400.6700, subp. 2 to show that this discovery is needed for the proper presentation of their case. The Respondents will have the names of any witnesses to be called and may contact those persons. It has not establish any need to contact customers and agents in contact with the Department, especially those who have voluntarily contacted the Department, in order to prepare their case.

The Respondents also seek an order compelling Gary Kemp and Mary McClure to answer questions about meetings with individual Minnesota legislators in 1996. During their depositions, counsel for Mr. Kemp and Ms. McClure objected on the basis of relevance and instructed the deponents not to answer. The Respondents argue that statements made by Kemp and McClure to legislators or other third parties may shed light on their intent and conduct leading up to their January 11, 1996 termination. They also argue that these conversations may provide impeachment information. The Respondent's also suggest that the 1996 legislative amendment may "clarify" what was meant by the 1994 statute applicable to this case. The Department argues that the 1996 legislative action is not relevant to this case since the violations alleged are of the 1994 law. Counsel for Kemp and McClure points out that the conversations occurred after the agents termination by the respondents. He also argued that the conversations could not be proper impeachment because the deponents are not parties in this proceeding. As the Respondents point out relevance has a broad meaning in discovery. Kalish v. Mt. Sinai Hospital, 270 N.W.2D 783, 786 (Minn.), Boldt v. Sanders, 111 N.W.2d 225, 227 (Minn. 1961). It is conceivable that the conversations with legislators would be related to the subject matter in this proceeding and would therefore be relevant. As the Respondent has pointed out, its witnesses have testified to 1996 legislative activity without objection. This discovery should be provided.

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The Department has requested a privilege log concerning the attorney- client and work product privileges asserted by attorneys Rizzolo, Dooley and Franzen during their depositions. The Respondents assert that the questions which were not answered involved the attorneys advice to their client and involve an internal discussion of matters to be litigated. The Department points out that whether a document or communication is privileged is a question of fact. Brown v. St. Paul City Railway Company, 62 N.W.2d 688, 701 (Minn. 1954). Without a privilege log no reasonable determination can be

made as to whether or not the assertion of the privilege is appropriate. The log must be provided in order to assist in making this determination.

The Department also seeks to take the deposition of Harvey Pierce, the president and chief operating officer of American Family Mutual Insurance Company. An earlier objection to the deposition of Mr. Pierce was sustained on the grounds of relevance. However, in an October 21, 1996 deposition in a Wisconsin lawsuit, Mr. Pierce indicated that he was advised of the termination of Gary Kemp prior to the termination. He may well, therefore, have relevant information concerning the subject matter of this contested case proceeding. Although the Respondents argue that this is not new information, it is sufficient to establish that Mr. Pierce may have relevant testimony and therefore, the Department is entitled to take his deposition in this matter.

The discovery deadline and the beginning of the hearing are continued as indicated in the Order in order to allow the parties sufficient time to complete discovery and prepare for the hearing.

G.A.B.